In the Supreme Court of the United States.

October Term, 1906.

No. 184.

COSMOPOLITAN MINING COMPANY,
Plaintiff in Error,

vs.

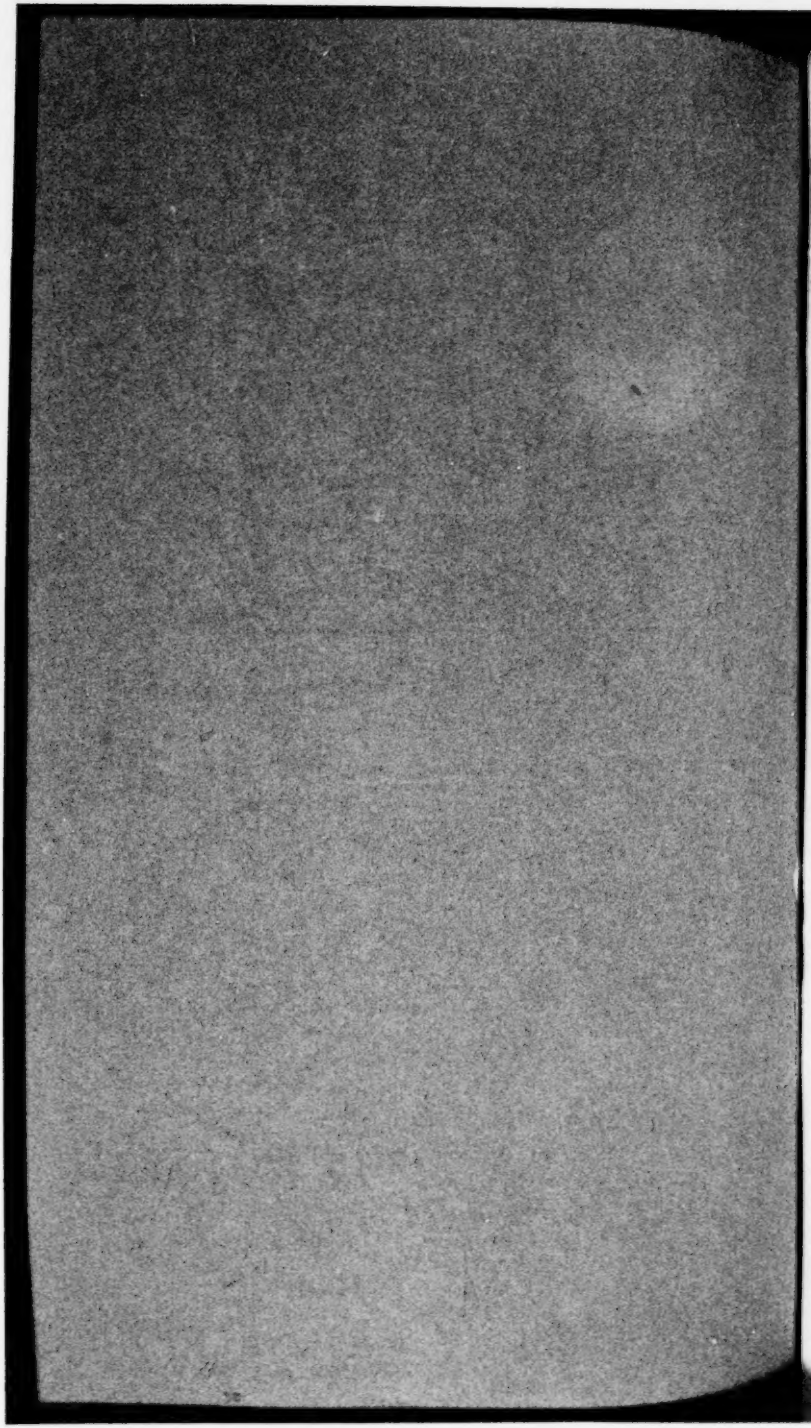
THOMAS F. WALSH, Defendant in Error.

Error to the Circuit Court of the United States for the District of Colorado.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

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PLAINTIFF IN ERROR,

vs.

THOMAS F. WALSH, DEFENDANT IN ERROR.

BRIEF AND ARGUMENT OF DEFENDANT IN ERROR.

On the 26th day of June, 1884, the plaintiff in error was organized under the laws of the state of Maine, for the purpose of "buying, owning, selling, leasing, working, developing and improving gold, silver, copper and other mines, and purchasing and holding such other property as may be necessary or convenient." On December 16, 1885, in compliance with the requirements of the laws of Colorado, it designated Ouray, Ouray county, Colorado, as the principal place where its business would be carried on in that state,

and J. M. Jardine as its authorized agent, "upon whom process may be served."

On June 8, 1890, it became the owner, by conveyance from one Thomas F. Wentworth, of the Yellow Rose, Norma, Crusader, Talisman, Hidden Treasure, Gertrude and Emily lode mining claims, and the mill sites patented therewith, all situate in the county of Ouray, and state aforesaid.

In the months of April and May, 1895, certain creditors of the Cosmopolitan Company, viz., the A. W. Begole Mercantile Company, John Ashenfelter, P. H. Fennell, W. C. Fulton, and Daniel Golden, began their respective actions in attachment in the County Court of Ouray county against the company. Writs in these cases were placed in the hands of the sheriff, and, excepting that in the Fulton case, were levied on the property above mentioned. These levies were duly recorded, as required by law. The summons were returned *non est inventus* as to Ouray county. Similar process was served, however, by the sheriff of the adjoining county of San Miguel upon Jardine, duly appointed process agent of the company, then in that county.

In due course, judgments by default were entered in these actions against the defendant, and special executions were issued against the property hitherto attached. The Golden judgment was settled, and the sheriff duly advertised and sold the mines and lode claims, under the Begole execution, to J. C. Marsh, trustee, for the sum of $1,616.97, on the 24th day of August, 1895. Marsh sold and assigned his certificate of sale to Stephen A. Osborne on January 4, 1896. On May 26, 1896, the statutory period of redemption having expired, the sheriff executed his

deed for the premises to Osborne, who, by deed of June 16, 1896, for a stated consideration of $10,000, conveyed them to the defendant in error, who entered into, and has since been in, the possession thereof.

On March 1, 1897, Walsh filed his bill in the District Court of Ouray county against the Cosmopolitan Company and Jardine to quiet and confirm his title to all the mines in suit, save the Norma mine and mill site, which were in some manner omitted from the bill. Service was had upon Jardine in Ouray county, as the agent of the company. Jardine disclaimed any interest in the suit; alleged that he had mailed the writs in the original cases, with postage prepaid, to the president of the company, in envelopes with return cards printed thereon; that he had received no reply; that the letters were not returned, and that he had, therefore, permitted judgments to go by default.

The return to the summons in this case recites that service was made "on the Cosmopolitan Company by delivering to John M. Jardine, the duly authorized agent of the defendant company, and designated by it as the person upon whom service should be made, a copy of said summons, with a copy of the complaint attached specially for said defendant company." A default was entered against the company on March 25, 1897, and thereafter a judgment upon evidence was entered, confirming the title of the plaintiff to the mines mentioned in the complaint, and decreeing that "the said defendants have not, nor have either of them, any right, title, interest, claim or demand in or to any part of the premises above described, and that the pretended claim of the defendant, the Cosmopolitan Mining Company, in and to said premises, is wholly without right or justification in law. That the plain-

tiff is the owner and in the possession of the premises and mining claims above described, and entitled to the quiet and peaceable possession of said mining claims, and each of them."

On the 3d day of November, 1900, the plaintiff in error filed its complaint in ejectment against the defendant to recover possession of the mining premises in controversy. The defendant made answer on the 28th day of January following, to which, on February 28th, the plaintiff replied. Nine months subsequently plaintiff's counsel seem to have discovered some relation of the fourteenth amendment to their client's demand, hence they filed an amended replication, alleging that "the plaintiff has been, and is being, deprived of its property, viz., the property sought to be recovered in this action, without notice, hearing, opportunity to be heard or due process of law, and in violation of the fourteenth amendment to the Constitution of the United States."

On June 20, 1902, the cause being on trial, the jury, by the court's direction, returned a verdict for the defendant. Three days afterward judgment was rendered on the verdict. The case is now here, pursuant to the certificate of his Honor Judge Marshall that in the record "were involved the application and construction of the Constitution of the United States, viz., of the part of the fourteenth amendment to the same which provides for due process of law."

ARGUMENT.

The title of the defendant in error to the premises sought to be recovered is founded, first, upon execu-

tion sales thereof under the judgments of the County Court of Ouray county, in the attachment cases instituted therein against the plaintiff in error by its creditors; and, second, upon the decree of the District Court in the Walsh case, whereby his title derived from the sales under these judgments was sought to be confirmed. If title under the judicial sales be proof against collateral attack, independent of the confirmatory decree, the latter becomes unimportant. If, in the original proceedings, any defect sufficiently serious to expose the judgment to collateral attack existed (which we deny), and such defect has been cured by the confirmatory decree, the validity of the latter is an essential subject of inquiry.

We shall contend for the affirmance of the judgment of the court below because:

First. *The County Court of Ouray county had jurisdiction of the defendant and of the property in controversy in the attachment suits. Either element is sufficient to sustain the judgments complained of and the title founded upon them.*

Second. *The District Court of Ouray county had jurisdiction of the defendant company and of the subject-matter of the action. Either element makes its decree conclusive upon the parties to this proceeding.*

Preliminary to these propositions is a question affecting the regularity of the proceedings in suing out the writ and assigning errors which justifies a demand for dismissal.

A PRELIMINARY OBJECTION.

The case comes to this court on writ of error direct from the Circuit Court of the United States, and

is, therefore, governed by Rule 35, requiring the plaintiff in error to file with the clerk of the court below an assignment of errors with his petition for writ of error. It is also by the rule provided that "no writ of error or appeal shall be allowed until such assignment of errors shall have been filed." It appears from the record (Transcript, pages 114-115) that the writ of error and citation were issued and dated August 15, 1902. The assignment of errors was not filed until the 18th of August, 1902, or three days thereafter. (Transcript, page 23.)

Rule 35 of this court is practically identical with Rule 11 of the Circuit Court of Appeals, and which has been enforced sometimes on motion, sometimes by the court of its own motion. In United States vs. Goodrich, 54 Fed. Rep., 21; 4 C. C. A., 160, the appeal was dismissed because the assignment of errors was not filed prior to or at the time of the taking of appeal. A similar decision was made in Union Pacific Ry. Co. vs. Colorado Eastern Co., 4 Fed., 22, since which time its enforcement has been constant, and appeals and writs of error dismissed where the same was not strictly observed.

Railway Co. vs. Reeder, 76 Fed., 550.
Van Gunden vs. Railroad Co., 52 Fed., 838.
Flahrity vs. Railroad Co., 56 Fed., 908.
Lloyd vs. Chapman, 93 Fed., 599.
Insurance Co. vs. Conoley, 63 Fed., 180.

In Frame vs. Portland Gold Min. Co., 108 Fed., 750, a motion was sustained to dismiss the assignment of errors, and was filed two days after the filing of the

writ. Judge Sanborn, in dismissing the writ of error, says:

> "This is a just and reasonable rule. It makes the filing of the assignment of errors before the writ is allowed indispensable to its issue, to the end that the judge to whom application is made for its allowance may be informed what the alleged errors are upon which the petitioner relies, and may thus intelligently decide whether or not the prayer of his petition should be granted, and also to the end that the opposing counsel and the appellate court may be informed what questions of law are raised for consideration."

We invoke the same construction of Rule 11 of the Circuit Court for the reasons therein alleged. Inasmuch as the writ of error is governed by Rule 35 of this court, its requirement should be applied and enforced in like manner as Rule 11 is enforced by the ~~courts of~~ the Circuit Courts of Appeals.

CASE ONE OF COLLATERAL ATTACK.

This case involves the sole question of the right of plaintiff in error to collaterally attack the validity of the judgments in attachment in the County Court of the county of Ouray, under which the premises in controversy were sold and the defendant's title derived, and of the decree of the District Court of Ouray county confirming that title. Every attitude assumed and every argument advanced by coun-

sel ultimately resolves itself into that proposition. Unless the power to thus assail these judgments can be established, the entire proceeding must fall to the ground. To establish it, the plaintiff must demonstrate that the courts rendering them were without jurisdiction; that they and each of them are of no force whatever, either *in personam* or *in rem*, and therefore void.

> "To make a judgment void collaterally, either (1) a legal organization of the tribunal, or (2) jurisdiction over the subject-matter, or (3) jurisdiction over the person must be wanting, or (4) one or more of these matters must have been lost after it once existed."
>
> Van Fleet on Collateral Attack, section 16, and cases cited.

We shall endeavor to show that every essential element to the validity of the judgments and decree in question, as outlined by Judge Van Fleet, and sustained by his authorities, is present in this record, and that the argument of plaintiff in error is founded upon the false assumption of the absence of one or more of them.

VALIDITY OF SERVICE ON AGENT IN ADJOINING COUNTY.

First. It is only upon the assumption that the judgments of the County Court are void that the plaintiff in error can support its attack upon them in an action of ejectment against the purchaser in possession. Both its original and amended replication

aver the want of jurisdiction of the County Court and seek to nullify all its proceedings. Its right to assail them collaterally would, indeed, be limited by that contention independent of its pleadings; for, as stated by this court in Cooper vs. Reynolds, 10 Wallace, 308,

> "It is a maxim of the law that when the judgment of a court is offered in evidence collaterally in another suit, its validity can not be questioned for errors which do not affect the jurisdiction of the court that rendered it."

Hence, if the County Court of Ouray county had jurisdiction either of the person of the plaintiff in error by the service of process, or of the property, obtained by a seizure under the lawful process of the court, or both, the plaintiff in error can not prevail.

The character and manner of service of the summons and writs upon the plaintiff in error have been correctly stated. The statutes, as far as they seem to be relied upon, have been correctly quoted. Others, however, seem to us to be important in determining whether the service was lawful; and to them we shall presently refer.

The position of plaintiff's counsel, as we understand it, may be thus summarized: Valid service upon a foreign corporation can be had only by delivering process to an agent in the county where the suit is brought, or, if no such agent can be found, then by delivering the same to a stockholder found in such county. A process agent designated under section 499, Mills' Annotated Statutes, must continue to re-

side at the corporation's principal place of business. If he removes from such county, he ceases to be such agent. Hence service upon him as such agent is void.

It is obvious that if these assertions are correct, there can be no service upon a foreign corporation which does not have either an agent or a stockholder in the county where suit is brought. It is equally obvious that if it has no stockholder in the state, and its only agent appointed under section 499 of Mills' Annotated Statutes has subsequently removed from the county of his original residence, no service of process is possible. Such results justify the inference that counsel's deductions are erroneous.

Section 38 of the Code, which provides for service of process, was enacted April 13, 1891, as an amendment to section 38 as it then stood. The amendatory act comprises three sections, of which 38-a and 38-b, of Mills' Annotated Code, are the last two. These sections are as follows:

> Sec. 38-a. "This act shall be liberally construed, and no service of summons shall be set aside or quashed for any technical error, defect or omission, either in the summons *or the service of the summons*, which error, defect or omission does not affect some substantial right of the defendant or defendants therewith served."
>
> Sec. 38-b. "All acts and parts inconsistwith the provisions of this act are hereby repealed; *but nothing herein contained shall be held to repeal any provision of the law now in force which authorizes or permits a*

summons to be served in any other county of the state than that in which the action is brought."

Appreciating the force and importance of the proviso of section 38-b, counsel have sought to confine it to special proceedings provided for by independent statutes not included within the Code of Practice; but no such narrow effect can be given to the section. The title of the act of 1891 is:

> "To amend section 38 of an act entitled an act to provide a Code of Procedure in civil actions," etc.

It is as much a part of the Code, therefore, as the section which it displaces. Not only so, but by the terms of section 38-a, it is to be liberally construed, and section 38-b expressly declares against the repeal of *any provision of law in force* authorizing or permitting a summons to be served in any other county of the state.

The Colorado Code does not require actions to be brought in any particular county, but it has provided for the place of their trial. By section 25, "actions for the recovery of real property," and by section 26 actions for statutory penalties and against public officers "shall be tried in the county where the subject of the action or some part thereof is situated," or "where the cause of action or some part thereof arose." By section 27 all other actions

> "shall be tried in the county in which the defendants or any of them may reside at the time of the commencement of the action, or

> in the county where the plaintiff resides when service is made on the defendant in such county, or if the defendant be a non-resident of this state, the same may be tried in any county in which the defendant may be found in this state, or in the county designated in the complaint, and if any defendant or defendants are about to depart from the state, such action may be tried in any county where plaintiff resides, or where defendant may be found and service had. Actions on book accounts or for goods sold and delivered may be tried in the county where plaintiff resides, or in the county where the goods were sold," etc.

The Supreme Court of Colorado has decided that this chapter provides the county where the action shall or may be tried subject to change of place of trial, and not where it must or shall be brought, and that no territorial limit is fixed by the Constitution or by the statutes of the state to the civil jurisdiction of either the District or County Courts. Hence, it is not a jurisdictional defect to bring an action in an improper county. The remedy is to change the venue to the proper county, which the court need not do of its own motion.

Fletcher vs. Stowell, 17 Colo., 94.

Section 34 of the Code outlines the contents of the summons, which, among other things, shall

> "require the defendant to appear and answer the complaint within twenty days after the

> service of the summons, if served in the county in which the action is brought, *or if served out of such county,* or by publication, within thirty days after the service of summons exclusive of the day of service."

It has been held that the service of process of a court upon a defendant within the state gives it jurisdiction of the person, and that valid personal service in an action may be obtained in any county of the state.

> Weiner vs. Rumble, 11 Colo., 607.
> Fletcher vs. Stowell, 17 Colo., 94.

Service by publication is authorized by section 41 of the Code, only

> "after summons is issued and the return thereon made that the defendant, after diligent search, can not be found. After such return, and not less than ten days after issue of summons, publication shall be made by order of the clerk of the proper court," in certain specified forms of action, but only upon "an affidavit stating that either the defendant resides out of the state, or has departed from the state without intention of returning, or has concealed himself to avoid the service of process."

Section 37 of the Code declares that

> "the summons shall be served by the sheriff of the county where the defendant is found, or by his deputy," etc.

That this requirement is not limited to natural persons will be apparent upon applying to it certain clauses of our corporation act.

By section 499, Mills' Annotated Statutes, foreign corporations, upon complying with its conditions, "shall be subjected to all the liabilities, restrictions and duties which are, or may be, imposed upon corporations of like character organized under the general laws of this state, and shall have no other or greater powers."

Section 503 provides that "suits may be instituted and prosecuted by and against any corporation formed or recognized (organized) under this act, in the same manner and like cases as natural persons."

Section 506, Mills' Annotated Statutes, prescribes the method of service in suits against any corporation, which, as to such method, has been repealed by the Code.

Little Bobtail Co. vs. Lightbourne, 10 Colo., 430.

It also contains a provision, "*that the plaintiff may, in all cases, bring his action in the county where the cause of action accrued.*" This proviso has never been repealed, either expressly or by implication.

It is manifest, from a consideration of these sections:

First—That a foreign corporation, complying with the requirements of section 499, is subjected to all the liabilities, duties and restrictions imposed upon domestic corporations of like character.

Second—That suits may be instituted and prosecuted by or against any such corporations in the same manner and in like cases as natural persons; and

Lastly—As natural persons may bring suits of a personal character wherever they reside, where the contract was made or is to be performed, or where the defendant resides or may be found, it follows that actions may be instituted and prosecuted against foreign corporations either in the county designated by them as the principal place of business, or in any other county where a suit could be brought by or against a natural person, and may be served by the sheriff of the county where it is found. The saving clause of section 38-b was, therefore, intended to, and does, relate not only to the other provisions of the Code, but as well to the above sections of Mills' Annotated Statutes. Inasmuch as the execution under which the premises in question were sold issued upon the judgment in the case of Begole Mercantile Co., a corporation, vs. the plaintiff in error, we are largely concerned with the record in that case. The complaint (Transcript, page 66) alleges that the plaintiff company was a domestic corporation doing business in the city and county of Ouray, state of Colorado. For its second cause of action it alleges that the defendant was indebted to the San Juan Hardware Co., a corporation, doing business in said city and county of Ouray, which indebtedness was assigned to the plaintiff. The suit, then, was brought by the plaintiff, at its place of business and residence, against the defendant company, in the county which it designated as its principal place of business, for the amount of its claim. The conclusion is inevitable that the contracts forming the basis of the suits were made with the defendant in Ouray county, and that the goods were delivered to it therein. The summons (Trans-

script, page 69) in that case, addressed to the defendant, commanded it to appear and answer the complaint within twenty days, if served within the county, or, if served out of the county or by publication, within thirty days after the service thereof, if served within the county, etc. Were the defendant a natural person no question could be raised as to the validity of the service of the summons beyond the limits of the county. As the statutes place all corporations on the same level with natural persons for the purpose of suit, service of summons outside of Ouray county, if the agent of the defendant is not found therein, brings it as fully within the jurisdiction of the court as though it were a natural person. The default was taken upon such service June 14, 1895. (Transcript, page 36.) And the court expressly adjudged therein that summons had been served upon one J. M. Jardine, the heretofore duly authorized and acting agent for said company. Judgment was thereupon entered after the introduction of testimony. It appears that the lawfulness of the service and the truth of every averment of the complaint was proven to the satisfaction of the court, and the judgment, importing absolute verity, is conclusive against all parties hereto.

Frick Co. vs. Wright (Tex.), 55 S. W., 608.

Exhibit R, so greatly relied upon by plaintiff in error, was filed by Jardine on May 27th. (Transcript, page 96.) He admits service of the summons and writ of attachment upon him May 8, 1895, but alleges non-agency by reason of change of residence. The default and judgment having been entered on June 27,

1895, thereafter, its recitals show *inter alia* an adjudication of valid service.

The records of the other suits in attachment are, in all substantial recitals, identical with that of the Begole case.

We contend, under these statutes, the plaintiffs in the attachment cases rightfully brought their actions in Ouray county, and that the service of process in San Miguel county upon the agent of the plaintiff in error, duly designated for that purpose, he being found therein, was sufficient to give the court jurisdiction for its subsequent proceedings. No substantial right of the plaintiff in error was affected, and the right to make such service was expressly recognized by section 38-b of the Code. Of course, service thus made extended the defendant's time for answering to the period of thirty days after service.

In his return of the process issued in the Begole case, on April 26, 1895 (Transcript, page 39), the sheriff of Ouray county certified that he was "unable to make service of the within writ on the within named defendant, there being no person within my said county upon whom process might be served."

On the 7th day of May thereafter (pages 68-70) both the writ and summons were served by the sheriff of San Miguel county by delivering the same to J. M. Jardine, "the duly authorized agent of the defendant company."

By section 499, Mills' Annotated Statutes, foreign corporations are required, before they are authorized or permitted to do business within the state, to make and file a certificate, signed by the president and secretary of such corporation, duly acknowledged, etc.,

designating both the principal place where the business of said corporation shall be carried on in the state, and *"an authorized agent or agents in this state," residing thereat, upon whom process may be served.*

This section merely emphasizes the constitutional mandate that

> "no foreign corporation shall do any business in this state without having one or more known places of business and an authorized agent or agents in the same upon whom process may be served."
>
> Colorado Constitution, article XV, section 10.

This section is complied with whenever a certificate, signed and acknowledged by the president and secretary, substantially setting forth its requirements is duly filed and recorded.

> Goodwin vs. Colo. Mortgage Co., 110 U. S., 5.

A foreign corporation, having done this, is presumed to be doing business in the state, and its right to do so can not then be gainsaid. None of its stockholders are required to reside in the state, nor is it obliged to have more than a single agent. Like domestic corporations, it may be sued in any county in the state subject to a change of place of trial. If counsel's construction of section 38 of the Code be correct, it would follow that no action could be brought against a foreign corporation, the laws of the state to the con-

trary notwithstanding, except in the courts of the county wherein such agent resides, unless the latter should be found in some other county. In that event the courts of the latter county would alone have jurisdiction, and creditors of the concern would be compelled to go wherever the whim or the fancy of the agent should take him. In Colorado Iron Works vs. Sierra Grande Mining Co., 15 Colo., 499, which was a suit brought to recover a balance due for goods sold and delivered, the sheriff served the summons by delivering a true copy to one Samuel Alsop, a stockholder of the defendant company. He further certified that the defendant corporation kept no principal office in any county of the state; that there was no county in which its principal business was carried on, no president, vice-president, secretary, treasurer, cashier, general agent, superintendent or agent thereof, could be found in the county, but that each and every officer was absent therefrom. The defendant, a foreign corporation, moved to quash the return of the summons, among other reasons, because Alsop was neither an officer nor stockholder of the defendant. It appeared that Alsop had gratuitously transferred his stock to trustees whose names he did not know, and had contributed $50 to cover the expenses of the transfer. The service was, nevertheless, sustained. The provision of the Code then in force provided that if the suit be against a foreign corporation doing business within the state, service should be made by delivering a copy of the writ to an agent, cashier, treasurer or secretary thereof. In the absence of such agent, treasurer or secretary to any stockholder.

"We can not agree with the counsel of appellee," said the court, "that the District

> Courts of this state are courts of limited jurisdiction, and that their jurisdiction over foreign corporations is dependent upon the voluntary acts of such corporations in placing themselves under such jurisdiction by complying with the requirements of section 260, General Statutes. (499 Mills.) They are courts of general jurisdiction, but depending, in obtaining such jurisdiction over corporations, upon the statute in so far as the statute departs from the common law in providing in what manner service can be had."

We contend that under section 499, Mills' Annotated Statutes, service upon a designated process agent, wherever found in the state, gives the court jurisdiction. Under section 38 of the Code service upon any agent in the county where suit is brought, or, in his absence, upon a stockholder therein, is equally effective. Neither statute is exclusive. Any other rule might exempt foreign corporations and their property from the jurisdiction of every court in the state.

State vs. Hannibal R. R. Co., 51 Mo., 532.

SERVICE UPON JARDINE SUFFICIENT.

In Henrietta M. & M. Co. vs. Johnson, 173 U. S., 221, it was held that personal service of summons made in the territory of Arizona on the general manager of a foreign corporation in that territory was sufficient service under the laws thereof to give its

courts jurisdiction. It was there contended that the provisions of the Code of Arizona regarding service were not applicable to foreign corporations, and that no service was effectual unless made upon the agent required by section 348 of the Revised Statutes, to be appointed for that purpose. The court held the language of section 348 to be permissive merely.

In the case of Venner vs. Denver Union W. Co., 15 Colo. App., 495, cited by counsel, it was held that service of summons on a foreign corporation can only be made by delivering a copy of the writ to an agent of the corporation found in the county in which the action is brought, or to a stockholder in that county, and that under no condition can service of summons be made upon the vice-president of a foreign corporation. The case is not in point, the only question being whether the proper person in the county was served. If the return upon the original summons had disclosed the existence of neither agent nor stockholder within the county, while the second writ recited service upon the duly authorized agent in another county, would a judgment based thereon have been held void for want of jurisdiction? We think not.

No reference is made in the Court of Appeals' decision either to sections 37, 38-a or 38-b of the Code, or to section 499, Mills' Statutes. The agency of the vice-president who was there served is arbitrarily denied. The decision is entitled to respect, but it is not a decision of our court of last resort. Besides, the real question there involved was as to the validity of service on Venner, vice-president, while casually in the state, and the *question of service on a designated agent was not discussed.*

In the case of Calhoun vs. Ajax Co., 27 Colo., 1, the Supreme Court of Colorado declared that where the decision of a tribunal is subject to review by one having superior authority over it for that purpose, or the same question may be passed upon by the superior tribunal in another case, the doctrine of *stare decisis* does not apply with full force till the question has been determined by the court of last resort.

Brown vs. Tourtelotte, 24 Colo., 204.

Davidson vs. La Plata County, 26 Colo., 549, 554.

Acting upon the authorities last cited, the District Court of the city and county of Denver, in Venner vs. Denver U. W. Co., which presented the identical question relating to the same judgment, declined to accept the action of the Court of Appeals as final. On the contrary, after an exhaustive hearing and argument, it sustained the validity of the decree based upon such service, and the case is now pending in the Supreme Court for final determination.

We quote from the opinion of the district judge:

> "Upon reason and authority, therefore, I am thoroughly satisfied that paragraph 260, General Statutes (section 499, Mills' Annotated Statutes), does not furnish an exclusive or even a preferred method of service, but that its sole purpose is to secure within the state the presence of a representative of each foreign corporation doing business here, upon whom process may be served with cer-

tainty, when it can not be served in any other of the methods provided by law; and that, under the statutes of this state, as they have existed since 1891, in an action against a foreign corporation which has designated an agent in compliance with said paragraph 260, the plaintiff has his option to cause service to be made either upon such designated agent or upon any other agent of the corporation who may be found in the county in which the action is brought."

In Mutual Life Ins. Co. vs. Spratley, 172 U. S., 602, this court has held that if it appears that there was a law of the state in respect to service of process upon foreign corporations, and that the character of an agency of a foreign corporation is such as to render it fair, reasonable and just to imply an authority on the part of the agent to receive service, the law will, and ought to, draw such an inference and imply such an authority, and service under such circumstances and upon an agent of that character is sufficient. Surely it can not be maintained that an agent designated for the identical purpose can not be served with process in a suit brought in Colorado against a corporation because he was served beyond the limits of the county in which the suit was brought, and especially when it appears that the defendant had neglected to appoint another agent within the county limits, and that no representative or stockholder of the company was at the time within said county.

Indeed, we might insist that if any exclusive method of service on foreign corporations is provided for, an agent thus appointed is the only one capable

of being served. This would be the case were not the statute providing for his appointment, in its language, permissive as to the manner of process. Thus it is held that if the law of a designated state requires a foreign corporation to appoint an agent within such state for the service of process, and empowered to receive service, service must be had upon that agent alone.

Baile vs. Equitable Fire Ins. Co., 68 Mo., 617.

Stone vs. Travelers Ins. Co., 78 Mo., 675.

The contention of counsel that section 38 of the Code, permitting service upon any agent of a foreign corporation contravenes the fourteenth amendment, is both curious and inconsistent. Curious because every authority relating to the subject recognizes the absolute power of the states to make any regulations they may see fit relating to foreign corporations doing business within their limits. Inconsistent, because the attachment records are assailed, in that service was not made upon some agent in the county where the suit was brought as the statute requires.

But does not this assertion of the unconstitutionality of the Code section justify the action of the attaching plaintiffs in serving process upon the "duly authorized" agent designated as required by the state Constitution and section 499 of Mills' Annotated Statutes? Instead of censure, they should receive credit for pursuing the only course which, under plaintiff's concession of the character of the Code requirements, was open for the service of process upon the company.

Not one of the six cases cited in aid of this proposition remotely supports it. None of them declare

that a state may not, if it desires, provide for service of process upon any agent of a foreign corporation doing business within its limits. They apply existing provisions of law to conditions revealed by the record.

Mr. Thompson says that whenever the law of the domestic state requires the foreign corporation, as the condition of doing business within the state, to appoint an agent and empower him to receive service of process and lodge evidence of such appointment with the secretary or other officer of the state, then, unless the language is *permissive*, so as to admit of other modes of service, it must be had on that officer alone, or there will be no jurisdiction.

6 Thompson on Corporations, section 8025.

He also, section 8028, asserts it to be a settled principle of American jurisprudence that, where a state imposes upon a foreign corporation as a condition precedent to its right to do business and make and take contracts within the state, the appointment of a resident agent within the state, with power of attorney, to receive service of process in actions against it brought therein, a judgment in personam against the corporation founded upon a service of process upon an agent so appointed will be good not only within the state in which it was rendered, but within every other state including the state creating the corporation.

If the general assembly of Colorado could, by statute, limit service of process on foreign corporations to agents or officers found only in the county where suit is brought and the place of business, and agent authorized to receive service were designated for some other county, it could thereby nullify the Constitution

itself; for, as we have seen, that instrument fixes the conditions under which foreign corporations may do business, one of which is the authorization of an agent or agents upon whom process may be served. The general assembly may add other modes of service; it can not deny to litigants the method provided by the organic charter of the commonwealth.

In Eagle Life Ins. Co. vs. Redden, 25 So. (Ala.), 779, service was "executed by handing a copy to Robert Cox." The defendant defaulted. Proof was offered that Cox, at the time of service, was local agent of the defendant in Elmore county, and judgment was entered for plaintiff. The Code provided that, "when the suit is against a corporation, the summons may be executed by the delivery of a copy of the summons and complaint to the president or other head thereof, secretary, cashier, station agent, or any other agent thereof." Other Code provisions existed relating specially to foreign corporations and mode of service thereon. They were held to be cumulative, "for the greater convenience of those who desire to institute legal proceedings against such corporations;" a conclusion as applicable to the recitals of Mills' Annotated Statutes, section 499, as to those of the Alabama Code.

The Supreme Court of South Carolina has construed the acts of 1887, providing that "service can be made, in respect to a foreign corporation, only when it has property within the state, or the cause of action arose therein, or when such service shall be made in this state upon the president or any agent thereof," and of 1893, that foreign corporations carrying on business in the state shall file in the office of the sec-

retary of state a declaration designating some place within the state at which legal papers may be served on said corporation; and held that service within the state upon the resident agent of a foreign corporation owning property in the state, at a place other than that designated in the declaration filed in the office of the secretary of state, in a cause of action arising in the state, was valid. The effect of the act of 1893 was "to extend the facilities for serving a foreign corporation, instead of diminishing them; for, as we have seen, under the provisions of the Code above cited, a foreign corporation could only be made a party to an action by personal service on certain designated officers or agents within the state, while, under provisions of the act of 1893, the service may be made by delivery of the papers to be served to any officer, agent, or even employe, of the corporation found in the premises designated as its place of business," etc.

Littlejohn vs. Southern Ry., 22 S. E. (S. C.), 761.

Jones vs. Ins. Co., 88 N. C., 499.

Howard vs. Ins. Co., 37 N. Y. Supp., 832.

Silver vs. Western Assurance Co., 38 N. Y. Supp., 335.

Clinard vs. White, 39 S. E., 960; 129 N. C., 250.

Section 1323 of the Arkansas statute requires a foreign corporation, to entitle it to carry on business in the state, to designate an agent upon whom service may be made, etc. Section 5672 providing that service of process on a foreign corporation, having an agent in the state, may be made on such agent, service

of summons on an agent in charge of the business of a foreign corporation at a certain place where the matters complained of occurred, was sufficient, though defendant had designated another agent on whom service might be made, as required by section 1323.

Lesser Cotton Co. vs. Yates, 63 S. W. (Ark.), 997.

It is evident, from the statutes and the authorities cited, that two methods of service of process upon foreign corporations being given, the one by section 499, Mills' Annotated Statutes, the other by section 38 of the Code, if service be made upon the person designated by the former as "the agent upon whom process may be served," it is good, without regard to the county in which such service may be had. If made under section 38 of the Code, it should be made in the county where the suit is brought, and, if such agent can not be there found, it may be made upon a stockholder in such country. Neither method is exclusive. In the one it is expressly provided that process "may be served" on the designated agent. In the other the specific mode of service provided is expressly declared not to repeal any provision of law in force permitting summons to be served in any other county in the state. No case can be found which decides that, if a foreign corporation is amenable to process at all, the service thereof on the designated process agent is bad.

A number of cases have been cited in which service of process beyond the limits of the county in which suit was brought is invalid. But in every instance it will be found that, by the general laws of the state, or those creating the particular court its process was

expressly limited to the county of the suit, or the jurisdiction of the court is expressly limited to that county.

All of those cited from Arkansas, for example, are controlled by the statute declaring that service can be had only in the county in which the suit is brought, which county must be that in which the defendant resided or was served. This is jurisdictional. The same is true of Florida and Missouri.

Many of the cases relate to summons from justices of the peace, served outside of county or township jurisdictions. They are not at all pertinent here.

It is only when the irregularity of service is so great as to amount to no service at all that the judgment based thereon is void.

1 Black on Judgments, 224, and cases cited.

In Brown vs. Chapman, 17 S. E., 855, 90 Va., 174, process against defendant had been directed to an officer of another county than that where the action was brought, in violation of section 3220 of the Code. A judgment rendered on such service was, though erroneous, sustained against a bill to enjoin proceedings under it.

Process issued by the courts of Colorado is addressed to no particular officer, but runs to all of them, and is confined to no particular county. If service is made in violation of the provisions of the Virginia Code, though unlawful, is sufficient to protect a judgment rendered thereon from extraneous attack, *a fortiori*, in Colorado service in an adjoining county, there being no statute prohibiting it, gives jurisdiction, and a judgment thereon would be sustained, even against direct attack.

JARDINE WAS PROCESS AGENT AT TIME OF SERVICE.

But it is also objected that Jardine was not at the time of service an agent of The Cosmopolitan Mining Company. This objection is based, first, upon Jardine's removal from Ouray county; and, second, that the company was not doing business in the state at the time of such service.

If it be true that a process agent of a foreign corporation forfeits his appointment by a change of residence from one county to another in the same state, the contention of plaintiff in error may be good; but there is nothing in the nature of the proposition, in the requirements of the statute, or in the language of any authority, to support the claim. The purpose of the appointment can be subserved in one county as well as in another, so long as the agent remains a resident of the commonwealth; for we have seen that, under the Colorado Constitution, the territorial jurisdiction of District and County Courts is coextensive with the boundaries of the commonwealth, and all persons within such boundaries are amenable to their jurisdiction. Hence the process agents of foreign corporations are amenable to service wherever found within the state. This view is strengthened by the fact that the statute provides for the appointment of an agent or agents *"in the state,"* etc.

If by moving from one county to another a process agent loses his commission, it would be easy for a foreign corporation to avoid service of process by prompting such removal, and to defeat jurisdiction by declining to make a second appointment; for the statute is silent as to a second designation, either as

to place of business or of an agent. Such a requirement may be implied, but not from the mere change of the agent's habitation.

The statute requires the selection of an agent residing at the company's principal place of business. It does not require the residence to be continuous. For purposes of convenience it might be desirable. For all practical purposes it is entirely unnecessary.

The zeal and diligence of counsel have failed to discover a single authority to support their assumption. They can easily discover a number in conflict with their claim and involving analogous conditions. As well might it be said that the president or manager of a corporation ceases to be such by taking up his residence elsewhere. Nothing short of death, resignation or removal from the state, or removal of the agent by direct act of the principal, the dissolution of the company, or its formal and complete withdrawal from the state, could operate as against third persons to cancel the agency thus created. By the laws of New Mexico, insurance companies were required to appoint an attorney at law in each county where its agencies were established, and to file with the territorial auditor an instrument authorizing such attorney to accept service, and also consenting that any service of process on such attorney should be taken and held to be valid as if served upon the company. An insurance company filed an instrument designating F. H. Kent & Co as its attorneys at Albuquerque, upon whom process could be served. Neither of them had been admitted to the bar. Shortly afterwards the firm dissolved, Kent continuing to do business at the same place under the same name. Service was made upon Kent against the com-

pany, and judgment obtained thereunder. Suit was then brought upon the judgment in the state of Massachusetts, where it was alleged in defense that the power to receive service was to the partnership, and not to Kent. Also, that Kent was not an attorney at law, and that the dissolution of the firm terminated the agency. The Supreme Court of Massachusetts said:

> "Taking into consideration its evident purpose, and its utter futility, if a company appointing an agent to receive service could, by an act known only to the agent and itself, withdraw its powers, it must be held that this appointment was irrevocable, unless the revocation might be made by the appointment, duly notified upon the public records, of a new agent who should be competent to receive service of process in regard to any controversies arising upon contracts previously entered into. No such act as this was done when the service of process was made. F. H. Kent & Co. were still held out by the public records as the agent on whom process might be served."

The judgment was enforced *in personam.*

Gibson vs. Manufacturers' Ins. Co., 10 N. E., 729; 144 Mass., 81.

The Supreme Court of Iowa, in the case of Green vs. Equitable Life, etc., Assn., 105 Iowa, 628; 75 N. W., 635, has expressly approved the principle enforced in Gibson vs. Ins. Co. This was an action on a foreign judgment rendered in North Dakota, upon serv-

ice upon an agent duly appointed under the laws of that state to accept and acknowledge service. Upon this proposition the court said:

> "Some claim is made to the effect that, although Carey was an agent for the defendant, with power to accept service of mesne and final process, that power did not authorize the service of summons upon him, especially as he did not accept service of it. In executing and filing the power of attorney which appointed Carey, it must be presumed that the defendant intended to comply with the law of the state, which provided for the appointment of an agent authorized to accept the service of process, 'and upon whom service of process might be made.' The power of attorney executed and filed did not, in terms, state that service of process might be made upon Carey, but it appointed him the agent of the defendant for the purposes of service of process, and the language used does not, in terms, exclude the right of parties to serve process upon him. The defendant, having undertaken to comply with the statute, and having done business under the appointment of Carey, which it filed, should not now be heard to say that, by reason of technical defects, the appointment made did not comply with the statute. Gibson vs. Ins. Co., 10 N. E., 729."

It is true that, by a statute of North Dakota, it was provided that where a foreign corporation ceased

to do business, the attorney last designated shall be deemed to continue as such for the purpose of receiving process for actions on liabilities previously created, in which respect it differs from the case at bar; but when it is considered that the company's principal place of business in the state was alleged in the record, and that the company's property was attached by due process of law, the doctrine of the Iowa case is here applicable.

In Eureka Land, etc., Co. vs. Yuba Canal Co., 66 Cal., 311; 5 Pac., 490, service upon the duly appointed agent as shown by the record was sustained, though at the time such person was not in fact such agent.

> "To hold otherwise would be to permit a foreign corporation to set at defiance all processes."

Timolate vs. Held Co., 10 Lea (Tenn.), 436.

Parker vs. Bethel Hotel Co., 96 Tenn., 252.

Parsons vs. Buffalo Mills, 29 N. Y. App. Div., 45.

In the case at bar designation of Jardine was made, as the statute requires, and no other appointment having been made, this agent was still held out to the public as the one upon whom process might be served at the time the suit was brought. (Transcript, pages 32-33.) The recognition of any other than the rule announced by the Supreme Court of Massachusetts would defeat the evident purpose of the statute itself.

> "This language does not confine the service to an agent who has been expressly an-

thorized to receive service of process upon him in behalf of the foreign corporation. If that were true, it would be easy enough to determine whether the person represented the corporation, as unless he had been so authorized he would not be its agent in that matter. In the absence of any express authority, the question depends upon a review of the surrounding facts, and the inferences which the court might properly draw from them. If it appear that there is a law of the state in respect to the service of process on foreign corporations, and that the character of the agency is such as to render it fair, reasonable and just to imply an authority on the part of the agent to receive service, the law will, and ought to, draw such an inference and to imply such authority, and service under such circumstances and upon an agent of that character would be sufficient."

Insurance Co. vs. Spratley, supra.

In People ex rel. vs. Justices, etc., 11 N. Y. Sup., 773, it was held that, although the city court of New York was not expressly empowered to issue its writs beyond the county limits, yet, having jurisdiction of actions against corporations, service of the writ in the pending case upon the insurance commissioner at Albany was sustained as essential to effectuate such jurisdiction.

If counsel's contention that the record fails to show that The Cosmopolitan Company was doing business in the state at the time of suit brought, and that the appearance of such fact is essential to the validity

of the judgment, is sound, the service of summons, however made, would become unimportant. This part of counsel's argument seems to constitute its principal feature, and the one point upon which the plaintiff in error chiefly relies for a reversal. The principle announced in St. Clair vs. Cox by this court is not only applied to the case at bar, but sought to be extended far beyond its original scope.

In the case of Mutual Life Ins. Co. vs. Spratley, this court, commenting with approval upon the case of St. Clair vs. Cox, said:

> "The case does not hold that a foreign corporation can not be sued in any state unless it be doing business there, and has appointed an agent expressly that process might be served upon him for it.
>
> "If it is doing business in the state, *or if, in compliance with the statutory conditions precedent for doing business, it has appointed an agent, and thereby consented that process might be served upon him*, jurisdiction may be acquired by service of process upon such agent, so that a judgment rendered thereon will be effective as a personal judgment."

In Barrow Steamship Co. vs. Kane, 170 U. S., 107, this court, pointing out the manifest injustice that would ensue if a foreign corporation, permitted by the state to do business therein and to bring suit in its courts, could not be sued in its courts, and thus, while allowed the benefits, would be exempt from the burdens of the state, in consequence of which many states have been induced to provide by statute that

a foreign corporation *making contracts within the state* shall appoint an agent residing therein, upon whom process may be served in actions thereupon, said:

> "This court has often held that wherever such a statute exists, service upon an agent so appointed is sufficient to support jurisdiction of an action against a foreign corporation, either in the courts of the state, or, when consistent with the acts of Congress, in the courts of the United States held within the same."

See, also,

Frick Co. vs. Wright, supra.

From these expressions we are justified in contending that the principle of St. Clair vs. Cox can not be, and never was, intended to apply to foreign corporations which have complied with local statutes and designated process agents thereunder. These form a distinct class, and when they have made compliance with the local requirements, they are subject to suit, and judgments in personam may follow, where jurisdiction has been acquired by service on such agent.

Nothing in the record warrants the several assertions of counsel that Walsh knew or had notice that Jardine was not the agent of the company. The only excuse for them is Exhibit R, which, as we have heretofore shown, was notice of nothing. Walsh was a stranger to the proceedings. It does not even appear that he was in Ouray county when the actions were brought or judgments taken. He had no knowledge of Jardine's residence, or change of residence. The

only information he could have had was that disclosed by the records of the office of the secretary of state and the recorder of the county, both of which confirmed the existence of the agency.

But how can plaintiff have taken advantage of such knowledge, even if it existed? We are not charged with fraud or double dealing. If Jardine was the agent, the service should have been made upon him. If he was not, Walsh's knowledge is immaterial. He has the rights of a purchaser for value, and, as hereafter shown, is entitled to the protection of the record. If he knew of any fact or facts invalidating the judgments or the jurisdiction of the court, and not shown by the record, the plaintiff should have alleged and proved them. It did neither.

"DOING BUSINESS."

We contend that the record of the Ouray County Court judgments shows full compliance with the requirements of St. Clair vs. Cox, as thus defined. These requirements are that either in the application for the writ, or accompanying its service, or in the pleadings, or in the findings of the court, it should appear that the corporation was engaged in business in the state. It is immaterial how or where the fact appears, or in what language it is expressed. What is, and what is not, doing business within the limits of the state has been the subject of much controversy.

The plaintiff company was organized for the purposes of

> "buying, owning, selling, leasing, working, developing and improving gold, silver, copper or other mines, and purchasing and hold-

ing such other property as may be necessary or convenient." Exhibit O, Transcript, page 27.

Counsel have made copious quotations from the record, the appendix to their brief comprising sixty-four pages. It is significant that they have omitted, both from their statement of facts and from the appendix, a copy of or any reference to Exhibit O. We are in the bounds of fair criticism in remarking that they should have apprised the court of the objects of the plaintiff in error in connection with their reiterated assertion that it was not doing business in Colorado, when summoned by its courts to answer the claims of its creditors.

At and before the time of the bringing of the attachment suits it had complied with the requirements of the Colorado Constitution and statutes, and was "*owning gold and silver mines*" in Ouray county. A part of its business, that is to say, a part of its corporate powers, was the ownership of mining claims. It complied with the statutes of the state for that, among other purposes, and the fact of its ownership was apparent from the fact of the attachments.

In Fritts vs. Palmer, 132 U. S., 282, it was held that the constitutional and statutory provisions of Colorado concerning corporations were valid in so far as they did not directly affect foreign or interstate commerce, and that the company involved therein violated the laws of the state when it purchased property therein without having previously designated its place of business and an agent. It is true that it was held that the deed was not thereby necessarily made absolutely void for every purpose; nevertheless, the duty to comply with the statute as

a condition precedent to the ownership of property was clear. The doing of business is the performance of one or more of the functions of a corporation within the jurisdiction of a state. The ownership of property is as much one of its functions as the working or operation thereof, and that fact appearing, it is sufficient for the purposes of this case.

In several complaints in the Ouray county cases the allegation is made

> "that the defendant is a corporation duly incorporated and organized under and by virtue of the laws of the state of Maine, with its principal office in the state of Colorado, at Ouray, in said Ouray county."

The principal office referred to can be no other than that which the statute requires to be designated as "the principal place in the state where the business is to be carried on." Being a foreign corporation, the allegation could refer to no other, and, the defendant having defaulted, affirmative proof of the allegation, although unnecessary, was received. Then, too, the return of the sheriff shows service upon "the duly authorized agent of the company." His Honor Judge Marshall, in admitting these records, said:

> "In each of the complaints is an averment that the corporation is a corporation duly incorporated and organized under and by virtue of the laws of the state of Maine; that its principal office in the state of Colorado is in Ouray, in said Ouray county. I take it that the maintaining of the principal office there is the being found within the state."

The doing of any one or more of the things enumerated in the articles of incorporation as comprising the objects of the organization is the doing of business. If buying, owning and selling property are parts of its purposes, its ownership of and holding property is as much an exercise of its corporate powers as would be the negotiations for purchase, or the sale thereof.

The main purpose of the statute requiring the selection of a principal place of business, and the designation of a process agent, was to avoid the contention now made, and it does avoid it. Observance of these conditions by a foreign corporation domesticates or naturalizes it; makes it, by virtue of such compliance, "subject to all the liabilities, restrictions and duties which are, or may be, imposed upon corporations of like character, organized under the general laws of this state." To hold otherwise is to give such a corporation "other and greater powers" and privileges, although prohibited by the identical section prescribing conditions under which it may do business at all.

In Utley vs. The Clark-Gardner Gold Mining Co., 4 Colo., 369, a construction was given to the statutory phrase "doing business," occurring in section 499, Mills' Annotated Statutes. The court said:

> "Taking language in its ordinary acceptation, a corporation does business by the exercise of its power to contract, its power to acquire and hold property, real and personal, and like powers. By the exercise of these corporate powers, it carries on its corporate business in the ordinary meaning of the term. By their exercise, it establishes

> its business relations, assumes obligations and acquires rights."

This decision was here virtually approved in Fritts vs. Palmer, cited supra.

The case of Jones vs. The Aspen Hardware Company, 21 Colo., 263, involved a construction of section 1 of the Colorado act of 1887, page 406, which required every corporation incorporated under any general or special law of the state, or any foreign country, or of any state or territory of the United States having capital stock divided into shares, to pay a certain fee on the amount of such capital stock to the secretary of the state, on filing its certificate of incorporation, and prohibited them from exercising any corporate powers or doing any business in the state until the fee was paid. The Aspen Company, without complying with this statute in its corporate capacity, took a conveyance of property to itself, which property was afterwards attached by a creditor of the grantor. The court said:

> "The taking of title to the property in controversy being the exercise of a corporate power, and as such forbidden until the fee for filing has been paid, it follows that the title of the Aspen Hardware Company, as a corporation, can not be upheld."

The Supreme Court of Missouri, in Missouri Lead Mining and Smelting Company vs. Reinhard, 114 Mo., 218; 35 Am. St. Rep., 746, was confronted with the question whether a foreign corporation, empowered by its articles to purchase, hold and operate mining lands in a certain foreign state, or elsewhere, was authorized to purchase and hold realty in the state of

Missouri. The court said:

"According to the record before us, there could be no doubt but the laws of that country (Great Britain) gave to this corporation the power to purchase, hold and operate mining lands in this state. There is nothing in the laws of this state denying to it the right to exercise those powers here * * * The memorandum of association provides that the registered office of this company is to be in England, and that the objects for which it is established are: 1. To adopt and carry into effect the agreement of the 8th of April, 1879, before mentioned. 2. To purchase or otherwise acquire and work any mines, minerals and mining rights, lands, hereditaments and chattels in the state of Missouri, in the United States of America, or elsewhere. 4. To purchase, sell and deal in lead and lead ores and other metals and metallic ores, and generally to carry on the business of mine owners and workers of and dealers in the products of mines.

"There is no doubt but that this corporation was organized for the primary purpose of purchasing and operating these particular mining lands in this state, but its business in the purchase and operation of mines is not restricted to this state. This is clearly shown by the words 'or elsewhere,' meaning elsewhere than in this state. This is the more apparent from the fourth paragraph: for in that no allusion whatever is

made to any locality. This company has, we conclude, the power to purchase and operate mining lands in England as well as in this state. * * * This corporation has its registered office in England, and holds its corporate meetings and can transact much of its business there. The fact that some portion of its business, namely, the purchase and operation of mining lands, can be carried on here and here only, is immaterial. It has, by the law of the place of its creation, the power to do such business here, and that business is not opposed to the policy of our laws, and we have no statute which denies to it the right to carry on such business here. This corporation, therefore, had and has the right to purchase, hold and operate these mining lands."

In Commonwealth vs. Gloucester Ferry Co., 98 Pa. St., 105, it was decided that a foreign ferry company is doing business in a state where it has leased a slip or wharf at which its boats touch for the reception and disembarkation of passengers and freight, although it does nothing else within the state. It seems clear, therefore, both on principle and authority, that the exercise of any of its corporate powers by a foreign corporation, after complying with the statutory conditions precedent of another state, is doing business within the comprehension of that term as used in the statute.

The Supreme Court of Alabama, in Beard vs. Union Publishing Company, 71 Ala., 60, declared that to constitute a doing of business within the state,

"there must be a doing of some of the works, or an exercise of some of the functions for which the corporation was created."

This decision has recently received the sanction of this court in Chattanooga, etc., Assn. vs. Denson, 189 U. S., 408.

The Santa Clara Female Academy vs. Sullivan, 116 Ill., 375, construes the phrase "doing business in this state," which is identical with the expression in the Colorado statute upon that subject, and holds:

"That receiving a devise of real estate is doing business in the state within the meaning of the statute. The decision calls attention to the fact that under the laws of Illinois, no discrimination against foreign corporations shall exist, but they are placed on the same footing with domestic corporations, and are given, by implication, equal powers, and places them under the same restrictions. Among other things it says, at page 384:

"'By declaring that foreign corporations shall have no other or greater powers, there is a direct implication that they shall have equal powers with domestic corporations of like character.'

"In Stevens vs. Pratt, 101 Ill., 217, this court says:

"'The manifest and only purpose (of this section 26) was to produce uniformity in the powers, liabilities, duties and restrictions of foreign and domestic corporations

of like character, and bring them all under the influence of the same law.'

"As the section reads, foreign corporations 'doing business in this state,' it is said this corporation is not embraced therein, as it is not doing business in this state. *Receiving lands in this state by devise and the assertion in the state of ownership over them, we regard a sufficient doing of business in this state to bring appellant within the purview of this language of the section.*"

As the receiving of lands is the doing of business, so, also, must be the holding of them after such receipt.

PRESUMPTIONS.

When a foreign corporation complies with the requirements of a domestic statute as precedent conditions to the doing of business by designating a principal place and appointing a process agent, which facts appear in the record, its cessation from business and withdrawal from the state will not be presumed. Such presumption, at least, can not form the basis of collateral attack upon a judgment, the record of which shows these conditions. The judgment which was attacked in St. Clair vs. Cox was founded upon service made upon an agent of the defendant company. The company had not complied or pretended to comply with the requirements of the Michigan statute, permitting foreign corporations to do business within its boundaries. The person upon whom process was

served was not a designated agent. There was nothing in the record to show that the company ever had been, or then was, doing business in the state, or had ever been present in the state in any capacity whatsoever. The judgment, as a personal one against the company, was, therefore, not sustained.

An insurance company, after complying with the statutes of Kentucky, was subsequently denied the right to continue business there, but continued the collection of premiums on policies previously written. Service upon statutory agent was made in cases subsequently brought against it, the validity of which was recognized by the state, but denied by the federal Circuit Courts.

In Mutual Reserve Association vs. Phelps, 190 U. S., 147, the service of summons upon the insurance commissioner against the insurance company was sustained, as giving jurisdiction of the defendant, although its license had been canceled by the insurance commissioner. This decision, we think, is the last expression of this court upon the subject.

In Insurance Co. vs. French, 18 How., 404, it is held:

> "Where a foreign corporation is permitted by the statute of another state to do business therein, the latter state has the right to impose, as a condition of the privilege, that it shall be suable by process upon its agent in the state, and a judgment obtained by such service is, under the Constitution and acts of Congress, entitled to the same faith and credit in any other state as it has, by law and usage, in the state where it was rendered."

In this connection counsel refer, with confidence, to the recent case of Forrest vs. Pittsburg Bridge Co., 116 Fed., 357. Service was there made upon a designated agent of the defendant corporation, which thereupon, by special appearance, moved to quash the service, and grounded its motion upon affidavits showing that the defendant company went out of business on the 12th day of May, 1900, since which time it was not engaged in business in Illinois, nor elsewhere, except at Pittsburg, Pennsylvania, where its officers continued to represent it for the purpose of collecting its credits and accounts and settling up its affairs, and that the agent had, in fact ceased to be such for nearly a year previous to the service of summons. The motion was sustained, and, on appeal, the decision of the court was affirmed. It was contended in that case that a foreign corporation, having complied with the act of Illinois, continued to be suable by service made upon a designated representative, when no certificate had been filed setting forth that the person named as agent in the process was no longer a person representing it. This contention was rejected by the Court of Appeals. It may be remarked, with reference to this case, first, that the testimony that the company had ceased to do business or to have an agent in Illinois months before the suit was brought was uncontradicted and unquestioned; second, the action was in form and substance one in personam; third, the defense that the company had ceased to do business before suit brought was made *directly in that proceeding.* We confidently affirm that if, without appearing, a judgment of default had been entered upon the service in that case, the record showing original com-

pliance with the domestic statute, the judgment would have been good in personam against the defendant company, which could not, save in a direct proceeding for that purpose, have assailed it. If, in that action, as in this, the case had been ejectment to recover property judicially sold under the former proceeding, the service would not have been quashed, but the court would have sustained the judgment. The decision is contrary to the opinion of this court in the Phelps case, cited supra. It should be noticed that, with the exception of St. Clair vs. Cox, and Venner vs. Denver Co., practically every authority cited by plaintiff in error, in support of its challenge to the validity of the service of process in the Ouray County Court, presents the question *directly in the original proceeding.* The complaining defendant, by motion, demurrer or petition, preserved the question in the record, and was enabled, by appropriate appellate proceedings, to secure its immediate review. In the two cases specified the judgments were sought to be enforced as judgments in personam, which, under their peculiar circumstances, was not permitted. In neither of them was the service made upon the statutory process agent. We deny the effective force, therefore, of any of these authorities upon the case at bar. Here the defendant in error is in possession of the premises, under a sheriff's deed, based upon judgment and execution on cases brought by attachment, the manner of the service of process in which has never been directly questioned.

It is an established rule that where certain relations and conditions are shown to exist, they are presumed to continue, and hence he who seeks to rely

upon their discontinuance, after their existence has once been established, must, by evidence, establish his contention. This applies to agency, holding office, residence, domicile, settlement, title, position, and the like.

Thus, in McCullough vs. Phœnix Ins. Co., 113 Mo., 606, at page 614:

> "Elkin was, at the time of issuing the policy, the agent of defendant, as shown by the indorsement on it; and as there was no evidence to show to the contrary, and that it was agent's duty to put such indorsement on it when the application was delivered to him, it will be presumed that the duties of his agency were performed. Plaintiff's evidence that Elkin, knowing he was not insured, told him he was insured, and that he would not pay premium till loss occurred, was properly excluded."

The Supreme Tribunal, in Bunney vs. Ry., 111 N. Y., 343; 19 N. E., 71, holds that a person once a master of a vessel will be deemed to continue in that character until displaced by some overt act or declaration of the owners.

Burlington Ins. Co. vs. Thrailkill, 60 Ark., 530; s. c., 31 N. W., 265.

Henkel vs. Welsh, 41 Mich., 664; 3 N. W., 171.

Hensell vs. Maas, 64 Mich., 564; 54 N. W., 381.

Judge Easley says, in Henkel vs. Welsh, supra:

"We think the circuit judge erred, also, in declining to charge that notice of the defects given to the agent or broker, through whom the sale had been made, by the plaintiff was notice to the plaintiff himself. The agency, presumptively at least, continued until the transaction was closed."

[redacted]

The presumption is that the domicile of choice, like the domicile of origin, remains unchanged, and the burden of proof is on the person who alleges a change.

10 Am. and Eng. Ency. of Law, page 14.

But counsel say that the court should not have excluded Exhibit B from the record, and that defendant in error was bound by notice of its contents. That exhibit is a motion filed by the agent of the defendant

company on his own behalf. He was a stranger to the record, and without leave of the court had no authority whatsoever to interpose any motion or affidavit of his own therein. It was no more a part of the record than would have been the affidavit of any other third person to the same purport. The return of the sheriff could be questioned in no such way. The Ouray County Court very justly and properly gave it no attention, and the Circuit Court committed no error in sustaining our objection to its introduction. No authority is needed in support of the proposition that only matters appearing properly thereon can be considered as part of the judicial record, and that all matters extraneous thereto can only become part of the record by a bill of exceptions. The motion was merely interpolated in a bill of exceptions, and it could [illegible] not be successfully contended here that it was [illegible] proper to the transcript.

In Goodnow vs. Litchfield, 114 U. S., 630, the petition for removal alleged that the parties to the suit were citizens of different states, and it was stated generally in the order remanding the case that there was a finding of the court that they were not. That finding was based upon facts brought to the attention of the court in proper form. But the facts bearing upon the question of citizenship did not appear in the bill of exceptions or in an agreed statement of facts, nor in a special finding, nor in any other proper or appropriate mode. It, however, did appear from the record that certain affidavits copied into the transcript had been filed in the case. This court, speaking with reference to this notice, said:

> "The mere fact that a paper is found among the files in a cause does not, of itself, make it a part of the record. If not a part of the pleadings or process in the cause, it must be put into the record by some action of the court. Sargeant vs. State Bank, 12 How., 371, 384; 13 L. Ed., 1028, 1033; Fisher vs. Cockerell, 5 Pet., 248, 254; 8 L. Ed., 114, 116. This must be done by a bill of exceptions, or something which is equivalent. Here, however, that has not been done." * * *

Our rule 8, section 2, requires a copy of any opinion that is filed in a cause to be annexed to and transmitted with the record, on a writ of error or an appeal to this court; but that of itself does not make it a part of the record below.

Jardine takes it upon himself in the motion to say that, because he had not for several years last past, resided in Ouray county he could not be an agent of the defendant company, in accordance with the general laws of the state, and that he had not for years acted as such agent, and did not consider himself or hold himself out to be such, and, therefore, kindly informed the court that he refused to accept service thereunder. Although verified, Mr. Jardine's offer to present questions of law to the consideration of the court was properly determined and disposed of.

We have hitherto considered the objection to the continuation of the agency as affected by change of residence. We may concede, for the sake of argument, that Jardine had not for years "acted as the agent of the defendant company." The statute imposes no duty upon a designated agent which requires

any assertion of activity upon his part. He becomes the agent by virtue of his certificate of appointment. He has no duties whatever to perform. If it becomes necessary or desirable to serve process upon the company the notice served or delivered to him becomes effectual for that purpose. He can not refuse to receive it. His position is entirely passive. It is difficult to conceive of any action from which this agent could abstain whereby his functions under the statute had at any time been terminated. If his appointment carried with it the affirmative exercise of any duty or the pursuit of any line of active conduct, some attention might be given even to his assertion of non-agency. Even then, however, notice of the facts, to be effectual, must be brought home to any third person whose rights would be affected by them. It is not pretended, in the case at bar, that the plaintiffs in the Ouray county cases had any knowledge whatsoever, prior to suit, either of Mr. Jardine's residence in an adjoining county or of his previous failure to act as the company's agent. Of course, his refusal to accept service under the circumstances was ridiculous..

The endorsement upon the back of Exhibit R is peculiar. The paper is labeled as a "Notice to the court that the party purporting to be served was not an agent of the defendant." The defendant itself at no time repudiated Mr. Jardine's agency. The latter did not feel authorized to speak in behalf of the defendant, but only on his own account. An agency can not be repudiated or overthrown in any such manner, and the record as to this formidable document indicates that the court very justly and properly disposed of it.

The record of the Ouray county cases shows the proceedings to have been within the line of every requirement demanded by St. Clair vs. Cox, and kindred cases, as essential to the validity of judgments in personam against foreign corporations. The record discloses in substance the presence of the corporation in the state, its compliance with the requirements of the Constitution and of section 499, its ownership of property, and its transaction of business at the time of suit brought, and service upon its designated agent at a place within the territorial jurisdiction of the court.

The case of Rust vs. United Water Works Co., 70 Fed., 129, involved the construction of section 38 of the Colorado Code, in which His Honor Judge Sanborn, following the case of Goldey vs. Morning News, merely emphasized the general doctrine that,

> "in a personal action against the corporation, brought in a state in which the corporation is not incorporated, in which it does no business, and in which it has no agent, and in which no property is seized, service of summons upon an officer of the corporation temporarily within the jurisdiction is futile."

It is significant that, in the Rust case, the inference is that if the defendant company had appointed a process agent in Colorado, or if any property in the action itself had been seized, service upon such agent, or seizure by legal process of such property, would have given jurisdiction, there being no other jurisdic-

tional defect in the record, but Judge Sanborn held that the suit having been instituted by one foreign corporation against another in the Circuit Court of the United States, such court had no jurisdiction whatever, either of the parties or of the subject-matter. Hence, independent of the question of service, the want of jurisdiction was fundamental.

The case of Sullivan vs. Sullivan Timber Co., 101 Ala., 373; 15 So., 941, where counsel claim the principle governing service of process upon a foreign corporation not doing business within the state to be well settled and fully set forth, supports our contention. Section 4, article XIV, of the Alabama Constitution, provides that no foreign corporation shall do any business in the state without one known place of business and an authorized agent therein, and that such corporation may be sued in any county where it does business. Section 2642 of the Code provides that any corporation may be sued in any county in which it does business by agent. The Alabama case merely holds that unless a foreign corporation is actually doing business in some other county than the one where its office, place of business and authorized agent are designated, it can only be sued in the latter county. We fail to see wherein this decision supports any other than the contention that, if the agent is appointed in one county, a personal judgment can be obtained on suit in that county, and, if doing business elsewhere, it can be proceeded against accordingly. The application of this principle to the case at bar sustains the proposition that The Cosmopolitan Mining Company, having designated Ouray as its place of business, and Jardine as its agent, can be sued in

that county under the Constitution and section 499, Mills' Annotated Statutes, irrespective of any provision of the Code referring to the existence of agents or stockholders elsewhere.

After stating the proposition, with a citation of numerous authorities in support of it, the Alabama court says:

> "If the corporation was not engaged in the transaction of business, or had not property within the state which could be reached by attachment, though its head, or principal, officer may there have had his personal residence, or may have been found there casually, there could not be a valid service of process compelling it to appear.
>
> "A corporation, having fixed for itself a known place of business, and placed therein authorized agents, thereby gives to itself a locality or domicile, and so long as it continues there to do business, may be sued as a domestic corporation may be sued at its domicile or principal place of business. The liability to suit does not now rest upon the theory that the corporation, by sending its agents into the state for the transaction of business, is presumed to consent to be sued here. The assent is expressed in the condition upon which it can legally transact corporate business within the state."

It is only necessary to further observe that this question was, in the case cited, directly presented on

appeal from the judgment of the court below, which was a judgment purely in personam, there being no seizure, directly or indirectly, of any property subject to the process of the trial court.

RETURN SUFFICIENT AS TO JARDINE'S AGENCY.

Counsel complain that the sheriff's return of service upon Jardine in the attachment cases as "the duly authorized agent" of the Cosmopolitan Company fails "to show affirmatively that Jardine was an agent of such character as to authorize service of process upon him," and that defendant may not show that Jardine was the company's authorized agent by any extraneous proof. This contention virtually means that the officer's certificate does not mean what it says, but means just the contrary.

If the Code is to be taken literally, any agent of a foreign corporation may be served with process against it. Indeed, if any agent, great or small, general or special, be within the county of the suit, he must be so served. If section 499, Mills' Annotated Statutes, is a subsisting law, the agent thereunder appointed is designated as "an authorized agent," etc., upon whom process may be served. If, therefore, the officer's return is properly construed, the person served was the duly, i. e., the designated authorized agent of the defendant company.

It may be that a statute permitting service upon any kind of an agent "is inconsistent with universal principles of natural justice;" nevertheless, the states have full authority to so provide as to foreign corporations if they see fit. To hold otherwise is to deny

to them the sovereign right to exclude them altogether, or to admit them subject to any conditions their legislatures shall see fit to prescribe. The principle, however, is purely one of abstract interest here, since the record discloses service upon the individual deliberately selected and certified on the records of the secretary of state as the one on whom all process against the company "may be served." Hence, it seems hardly worth while to review the authorities collated by counsel on the general proposition further than to show that they have no application to any case that could arise under the provisions of the Colorado statutes.

In Stone vs. Travelers Ins. Company the return showed service on defendant by delivery of copy to the "state agent." It was held that the description referred to the agent appointed under the statute, and described him with sufficient definiteness. To same effect is Eagle Life Ins. Co. vs. Redden, 25 So. (Ala.), 779, supra.

In Farrell vs. Oregon Gold Mining Co. (Oregon), 49 Pac., 876, a *personal* judgment by default was sustained against a foreign corporation, although the return of service did not show that it was doing business in the state when service was made. That fact could be shown in any other part of the record.

See

J. L. Mott Co. vs. West. Coast Co., 113 Cal., 341; 45 Pac., 683.

Frick Company vs. Wright (Tex.), 55 S. W., 608, holds that, under a statute similar to ours, service on "E. F. T., agent of F. Co.," amended by order of court

to read "C. F. F., local agent of F. Co.," was sufficient service. This case also holds that, "where the record shows that defendant is a foreign corporation, and it is alleged that the corporation has a local agent in the state, and the court finds such allegation true, and that he has been duly served with process, the service of the citation is valid, although the record does not state, in direct terms, that the corporation is doing business in the state."

In Kiufeke vs. M. D. T. Co., 11 Fed., 282, the return wholly failed to comply with the requirement of the Missouri statute, requiring service "on an agent in charge of an office or place of business of defendant * * * having an office or doing business in the state." On motion of defendant, the service was quashed.

A. B. L. Assn. vs. Hallum, 59 Ark., 583, was an appeal from a motion to set aside a default on alleged defective service. The appeal was sustained, because the service did not comply with the statute requiring service on the agent designated for that purpose by the company. The service of a summons in that state must be in the county where suit is brought, and it was made in another county. We have seen that no such limitation applies to the process of the Colorado courts. Besides, the return here involved expressly recites service on the duly authorized agent, that is the designated agent of the company.

I. M. T. Co. vs. Kennedy, 24 Ill., 319, and C. P. M. Co. vs. Bank, 86 Ill., 587, were also appeals from orders denying motions to set aside defaults entered on defective service. In each instance the service on the officer "as president" or "as secretary" was held

not to be a return of service on the president or on the secretary, and, therefore, not a compliance with the positive mandate of the statute.

U. P. Co. vs. Pillsbury, 29 Kan., 652, and Dickerson vs. B. & M. Co., 43 Kan., 702, presented the question in the same way, and the same conclusions for the same reasons were announced. The kind of agent on whom service was made was not there recited. Here the return expressly informs the court who the agent was.

Kirby Carpenter Co. vs. Twombly, 101 Mich., 447; 59 N. W., 809, was an appeal from proceedings aimed at defective service. Section 7086 of the Michigan statute, authorizing summons of garnishment upon foreign corporations to be served by leaving a copy with any officer, member, clerk or agent within the state, was held to apply only to garnishment proceedings in which the original suit was instituted by attachment, and that under section 8055, requiring summons of garnishment against a corporation to be served on the president, cashier, secretary, treasurer, general or special agent, or other principal officer, a return, showing service upon "A., the agent of said defendant, having charge of its affairs within said county," was insufficient to confer jurisdiction. This decision was based on Railway Co. vs. Hunt, 39 Mich., 469, which defined the terms "general or special agent" to mean agents who, either generally or in respect to some particular business, have a general or special controlling authority.

Toledo Ice Co. vs. Munger, 82 N. W., 663, involved service on a domestic corporation in a case brought before a justice of the peace. Service was

held bad because not made on agent in charge of the business office designated by the corporation and certified to the secretary of state. Its pertinency to the case at bar is not apparent.

Haley vs. St. J. Ry. Co., 80 Mo., 112, was garnishment from a justice's court. The statute concerning service required it to be made on the "nearest station or freight agent" of the railroad company. The return specified the nearest agent only, and it was therefore quashed

These decisions were the result of direct proceedings. All of them involved the construction of statutes, and of returns different in all essential respects from those at bar. We might present additional counter authorities bearing on the general subject, but the decision of this court in Henrietta Company vs. Johnson seems conclusive upon the subject, and should be decisive here, even were this a direct instead of a collateral attack upon the sheriff's return.

Mr. Jardine had been "duly authorized" or appointed to receive service for the company. The expression could refer to no other than its designated statutory process agent.

Counsel's authorities relating to the form of sheriff's returns of process are those in which the return was directly attacked, or in which amendments were sought to be made to them as affecting domestic judgments. It is hardly necessary to add that they do not affect this controversy.

PROOF OF JARDINE'S AGENCY OUTSIDE THE JUDGMENT RECORD.

Counsel also attack the ruling of the Circuit Court, whereby copies of the resolutions appointing Jardine as agent for service of process, and duly certified under the hand and seal of the secretary of state, and of the county clerk and recorder of Ouray county, were admitted in evidence.

This objection is hardly consistent with the averments of plaintiff's replication that "no summons or other process, writ of attachment or other writ, was served on any agent of the plaintiff or served in any other way upon the plaintiff." (Transcript, pages 8, 10, 11, 12.) If the court was wrong in excluding testimony as to Jardine's agency because "the agency was a jurisdictional fact and can not be proved outside of the record itself," it was certainly right in excluding plaintiff's offer of testimony tending to show non-agency, save as to Jardine and the existence of his office in Ouray, hereafter referred to. But the court was right in each instance; the first, because the testimony offered did not disprove an agency, and the second, because service on the agent was an express issue in the case, and made so by the plaintiff's replication, and because, the jurisdiction of the County Court as to plaintiff's person being challenged, defendant had the right to support it by proof *dehors* the record. Besides, the proof, although in no manner contradicting the record, is admissible if counsel's contention be correct, that the judgment as to the federal courts is a foreign one. Mr. Black cites Thompson vs. Whitman, 18 Wall., 45, and many other authorities in sup-

part of the view that as to the record of foreign judgments the jurisdictional recitals of the record may be inquired into. (2 Black on Judgments, section 901, and cases collated.) Indeed, the recognition of this doctrine is essential to a consideration of the plaintiff's case; for if it be not true, its errors assigned, however meritorious, can avail nothing. And if evidence may be offered to overthrow such a judgment, it is clear that evidence to support it is equally pertinent.

The evidence offered by defendant in no manner contradicted the record of the judgments. It merely identified Jardine as the company's authorized process agent, by exhibiting his certificate of appointment, accompanied by the fact that it had never been revoked. This proof was perhaps unnecessary, if counsel's objection to it be well founded. The result would be, however, that the recitals of the record, being proof against assault or explanation, conclusively establish the regular service of process and the regularity of the ensuing judgments, executions and sales.

The cases cited by counsel in support of objections to the introduction of the certificates relate to records of domestic judgments, concerning which the rule seems to be fairly well settled, that their jurisdictional averments are conclusive. (1 Black on Judgments, 271.) Some authorities have extended the rule to foreign judgments as well, but they are opposed to the general current of the decisions. *And where the defendant in a foreign judgment traverses the fact of jurisdiction of his person*, the plaintiff

may introduce extraneous evidence to show the jurisdiction in fact attached.

Knowles vs. Logansport Co., 19 Wall., 58.

American Co. vs. Crafts, 156 Mass., 501; 30 N. E., 124.

Sears vs. Dacey, 122 Mass., 388.

2 Black on Judgments, 899.

THE JUDGMENTS VALID IN REM, AND EXEMPT FROM ATTACK, COLLATERAL OR OTHERWISE.

We have hitherto endeavored to sustain the judgment in the attachment suits, considered as judgments in personam, against the attacks of the plaintiff in error. If we have succeeded, there is an end to plaintiff's contention, and the judgment of the court below must be approved.

On the other hand, the defendant in error is not compelled to rely upon that position. The record of the judgments might disclose defects subjecting them to successful assault by the plaintiff in error in proceedings in personam against it founded upon them, and yet be impregnable to such assaults when considered as judgments in rem.

The proceedings were by attachment, and the property in controversy was levied upon, and the levies duly recorded. The judgments were for the sums mentioned, both in the complaints and the attachment writs. Special executions were issued under the judgments against the attached property, and upon the sale thereof a sufficient amount was realized to fully cancel the judgments and the costs of

the proceeding. No instance remaining they were completely extinguished, thereby making any effort to enforce them as judgments in personam both unnecessary and impossible. Section 91, Mills' Annotated Code, provides:

> "The plaintiff, at the time of issuing the summons or filing the complaint in an action on contract, express or implied, or at any time afterward before judgment, may have the property of the defendant, exempt from execution, attached as security for any judgment that may be recovered in such action in the manner prescribed in this chapter, unless the defendant shall give good and sufficient security to secur the payment of such judgment."

Section 92 declares that:

> "No writ of attachment shall issue unless the plaintiff, his agent or attorney, or some credible person for him, shall file in the office of the clerk of the court in which the action is brought, an affidavit setting forth that the defendant is indebted to such plaintiff, stating the nature and amount of such indebtedness as near as may be, and alleging any one or more of the following causes for attachment,"

Among which are:

> "Second—That the defendant is a foreign corporation."

"Tenth—That the defendant has failed or refused to pay the price or value of any article or thing delivered to him, which he should have paid for upon the delivery thereof."

"Eleventh—That the defendant has failed or refused to pay the price or value of any work or labor done or performed, or for any services rendered by the plaintiff at the instance of the defendant, and which should have been paid at the completion of such work, or when such services were fully rendered."

Section 92-c provides that:

"The final judgment in such action shall be a several judgment, wherein each creditor named as plaintiff shall have and recover of the defendant the amount of his claim or demand, as found to be due, together with his costs," etc.

Section 93 directs the sheriff

"to attach the lands, tenements, goods, chattels, rights, credits, moneys and effects of said debtor, of every kind, or so much thereof as will be sufficient to satisfy the claim sworn to, with interest and costs."

Section 97 provides for writs to different counties, and also provides that

"several writs may be issued at the same time to sheriffs of different counties."

Section 104 specifies the manner of levy:

"First. Real property standing upon the records of the county in the name of the defendant, shall be attached by filing a copy of the writ, together with a description of the property attached, with the recorder of the county."

Section 105 requires the recorder

"to record the levy in a book to be kept for that purpose, and to index the same in the records."

Section 109 reads as follows:

"If after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected by him, deducting his fees, to the payment of the judgment, and any balance shall remain due, the sheriff shall, if there be a general, personal judgment against the defendant, proceed to collect such balance as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment."

The record of the Ouray county cases shows a literal compliance with all the requirements of the at-

tachment law, and the County Court of Ouray county having, by virtue of its attachments, acquired jurisdiction of the property of the plaintiff in error, its subsequent proceedings were not void. Counsel for plaintiff in error have searched in vain for decisions to the contrary. Those which have been cited, almost without exception, apply to judgments in personam. Judgments in rem, or quasi in rem, rendered by a court having jurisdiction in itself, may in individual instances be voidable, but they are not void, and, therefore, can not be subject to collateral attack.

In the recent work of Clark & Marshall on Private Corporations, volume 3, section 861, it is said:

> "If a corporation has real or personal property in another state or country than that in which it is created, it may be proceeded against in such other state by attachment of the property, as in the case of any other non-resident, for the proceeding is in rem, and it is not necessary that the court shall acquire jurisdiction of the corporation."

Citing:

> Blackstone Mfg. Co. vs. Inhabitants of Blackstone, 13 Gray, 488, and a large number of other cases.

"Jurisdiction," says Van Fleet, "is simply power." The Supreme Court of the United States has defined it to be "the power to hear and deter-

mine," and afterwards, "to hear and determine, and give the judgment rendered."

U. S. vs. Arredondo, 6 Peters, 691, 710.
Ex parte Reed, 100 U. S., 13.

The levy having been properly made, the subsequent action of the court, whether regular or not, can not be collaterally assailed.

THE ATTACHMENT LIEN.

Counsel contend that, under Colorado statutes, the courts do not obtain jurisdiction by levy on property in attachment, unless a copy of the writ is also served upon the defendant. If this is true, the result is that no judgment *in rem* can be rendered in Colorado in attachment proceedings, since the service of the writ must convert the proceedings into one *in personam*. The statement of the result demonstrates the unsoundness of the proposition.

In Van Wagenen vs. Carpenter, 27 Colo., 444, the writ of attachment was levied by recording the same, in accordance with the statute. In addition thereto, the sheriff certified that "none of the within defendants were found within my county." At the time, the interest belonging to Gill, and which was covered by the attachment, stood on the records in the name of Anna Van Wagenen. Section 104 of the Code provides *inter alia* that:

> "Second: Real property, or any interest therein, belonging to the defendant and held by any person, or standing upon the rec-

ords of the county in the name of any other person, but belonging to the defendant, shall be attached by leaving with such person, or his agent, a copy of the writ, and a notice that such real property, giving a description thereof, and any interest therein belonging to the defendant, are attached pursuant to such writ, and filing a copy of such writ and notice with the recorder of the county."

This was not done. The case was afterwards dismissed as to all the defendants, except Gill, who was afterwards served by publication, and judgment entered against him. The judgment was collaterally assailed as being null and void, because it did not affirmatively appear on the return of the sheriff that the Code provision above quoted had been observed. The court held the judgment thus rendered to be proof against such attack.

The same section of the Code provides that:

"Real property, standing upon the records of the county in the name of the defendant, shall be attached by filing a copy of the writ, together with a description of the property attached, with the recorder of the county."

This having been done, the lien was consummated, and the jurisdiction of the court over the property was complete.

To constitute a valid levy upon land the officer must do some act to show that he has seized the prop-

ercy and exercised dominion over it, and that is sufficient to put the tenant upon notice.

It is not necessary that the officer, in levying upon land, should take possession of the same, enter upon it, or even have the same in his view.

Lessee of Cochrane vs. Loring, 17 O., 409.
Wood vs. Weir, 5 B. Mon. (Ky.), 544.
Miller vs. Sims, 3 Tex. Civ. App., 65.
Walton vs. Hope, 3 Tex. Civ. App., 499.
Campau vs. Barnard, 25 Mich., 381.
Schoonover vs. Osborne, 111 Iowa, 140; 82 N. W., 505; 82 Am. St. Rep., 496.
Craig vs. Fraser, 73 Ga., 246.
Hardin vs. Lee, 51 Mo., 241.
Freeman vs. Thompson, 53 Mo., 183.
Kane vs. McCown, 55 Mo., 181, 200.
Johnson vs. Gage, 57 Mo., 160.
Lessee of Paine vs. Moreland, 15 O., 435; 45 Am. Dec., 585.

Section 97 of the Code provides that several writs may be issued at the same time to the sheriffs of the different counties. Nothing in that or any other section requires a copy of the writ to be served upon the defendant in the county where the property is attached, or in the county where the suit is brought. On the contrary, by section 97, the writ shall be directed to the sheriff of *any* county in which the property of the defendants may be. The writs of attachment personally served on Jardine, as plaintiff's agent, were directed to and served by the sheriff of San Miguel county. Even, therefore, had counsel correctly stated

the law, the facts are against them, for the service was made upon the company's agent by the writs of attachment, properly directed to the sheriff of the county making the same, and nothing in the statute, direct or by implication, requires the service of a writ to be within the limits of any particular county. Having complied with what plaintiff in error claims to be the essential requirements of the law, the resulting jurisdiction of the court over the property must be conceded.

The great case of Cooper & Reynolds, 10 Wall., 308, though frequently distinguished, has always been approved by the federal and most of the state courts whenever the question has been directly presented. It was there determined, in harmony with the preceding case of Voorhees vs. Jackson et al., 10 Peters, 449, that no judgment can be void or disregarded in a collateral attack on any other ground than the one of the jurisdiction of the court which rendered it.

> "It is of no avail," said Justice Miller, "to say that there are errors in the record, unless they be such as to prove that the court had no jurisdiction in the case, or that the judgment rendered was beyond its power. This principle has been often held by this court, and by all courts, and it takes rank as an axiom of the law."

The learned justice then defined jurisdiction over the subject-matter to be

> "the nature of the cause of action and of the relief sought; and this is conferred by

the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in the authority specially conferred.

"Jurisdiction of the person is obtained by the service of process, or by the voluntary appearance of the party in the progress of the cause.

"Jurisdiction of the res is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it."

Jurisdiction of the latter class is expressly made to include the levy of a writ of attachment for the seizure of real estate lying within the territorial jurisdiction of the court. The facts of that case are too familiar to justify extended consideration. Suffice it to say that the only pretense of notice there given to the defendant was a most lame and ineffectual effort to comply with the statutory requirements of service by publication. In a direct proceeding upon the judgment it would probably have been reversed. This court justly held that when a writ has been issued and the property seized, and that property condemned and sold, it can not be urged that the court had no jurisdiction for want of sufficient publication of notice.

Needham vs. Wilson, 47 Fed., 97, was a bill inter alia to set aside two judgments obtained in the District Court of Colorado in attachment against the property of the Great West Mining Company. The bill, among other things, recited that the Supreme

Court of Colorado had determined the said judgments to be absolute nullities, but had refused to vacate them because the company had been guilty of laches in applying therefor. The court said:

> "If it were stated that the Supreme Court had reached the conclusion that the judgments were void, and had declared them to be void, and had set them aside upon that ground, we should still be compelled in this court to adhere to the doctrine first announced in the case, and which is found in Cooper vs. Reynolds.
>
> "The principle declared in Cooper vs. Reynolds is of general jurisprudence, affecting all actions in federal courts, and not at all controlled by any decision that may be made in any court of any state. But the Supreme Court of the state has not so declared."

The case of Purdy vs. Wallace-Muller Co., Ltd., 81 Federal, 515, was brought in a Massachusetts state court by process of foreign attachment without personal service. The case was then removed on the statutory appearance to the Circuit Court, and a motion interposed to dismiss, based on Goldey vs. Morning News, 156 U. S., 518. The motion was denied, and the case distinguished from that of Goldey. The court said:

> "After seizure of the property, the case may, at the election of the defendant, assume either of two forms, that of a proceeding in which only the res is involved, or that

of a personal action between individuals. It is by treating it as the latter that the defendant comes within the provisions of the statute of removals, and introduces the necessary element of diverse citizenship. If the defendant does not appear and is not served, as was said in Cooper vs. Reynolds, 10 Wall., 308, 312, the case becomes in its essential nature a proceeding in rem. If it is to be so regarded after removal, then should not the case be remanded, as not within the provisions of the statute authorizing the removal of suits between citizens of different states? If, on the other hand, the defendant treats it as a personal action, it becomes so, not by virtue of the service of process, but by virtue of its own act in electing to treat a proceeding in rem or quasi in rem, requiring no personal service within the jurisdiction, as a personal action. But, in whatever light these questions may be regarded, I am satisfied that the proper alternative is not to retain jurisdiction or to dismiss, but to retain jurisdiction or to remand."

In Ludlow vs. Ramsey, 11 Wallace, 587, this court, approving Cooper vs. Reynolds, said:

"The writ of attachment appears to be in due form, and to have been regularly served on the property; so that the court became fully possessed of jurisdiction over the case."

In White vs. Crow, 110 U. S., 183, the agent of the absent defendant appeared and consented to entry of judgment before the time for filing answer had expired. The court, approving Cooper vs. Reynolds and Cornett vs. Williams, 20 Wallace, 226, sustains the judgment, declaring that it could not be successfully attacked in a collateral way, even by the defendant, but the judgment must be assumed to be valid and binding until reversed in a direct proceeding.

In Hadley vs. Donoghue, 116 U. S., 3, this court, citing Maxwell vs. Stewart, 22 Wall., 77; Ins. Co. vs. Harris, 97 U. S., 331, and Green vs. Buskirk, 7 Wall., 139, and Cooper vs. Reynolds, declared that

> "by the settled construction of these provisions of the Constitution and statutes of the United States the judgment of a state court, in a case within its jurisdiction and against a defendant, lawfully summoned, or against lawfully attached property of an absent defendant, is entitled to as much force and effect against the person summoned or the property attached when the question is presented for decision in the court of another state as it is in the state in which it was rendered."

Field vs. Dortsch, 34 Ark., 399, was like this, an action in ejectment. The defendant claimed title under sheriff's deeds issued upon execution sale in suits by attachment against the plaintiffs. The writ was executed and returned "not found as to the de-

fendant." The notice of publication, signed by the sheriff, complied not at all with the law, and was followed by a judgment in default. Certain orders of sale thereafter made recited the appearance of the defendant by her attorney. The court declared it to have been a gross error in the Circuit Court to render judgment by default under the circumstances, but as it then had actual jurisdiction of the property attached, and as the intrinsic power of the court over the property originated with and related back to the levy, it could not be collaterally questioned.

In Hunter vs. Ruff, 47 S. C., 425; 58 Am. St. Rep., 529, and 25 S. E., 75, the judgment was on attachment and constructive service. It was held that a defendant who seeks to assail a judgment against him while he was a non-resident can not divest rights of interested persons which have vested before any assault has been made upon the judgment which, upon its face, was entirely regular and free from infirmity at the time the purchase was made.

In Hardin vs. Lee, 51 Mo., 241, an erroneous judgment and execution was held not to be void, or the subject of collateral attack, where jurisdiction was acquired of the property which was the subject of the action, or attachment, under a writ properly issued.

Massey vs. Scott, 49 Mo., 282.

Kane vs. McCown, 55 Mo., 201.

Bell vs. Gaylord, 6 N. M., 229; 27 Pac., 494.

Lovejoy vs. Albee, 33 Maine, 414; 54 Am. Dec., 630.

Molineux vs. Seymour, 30 Ga., 440; 76 Am. Dec., 662.

Dupont vs. Abel, 81 Fed., 534.

Bank vs. Clement, 109 Ala., 270; 19 So., 814.

Miller vs. White, 33 S. E., 333.

Freeman vs. Thompson, 53 Mo., 195.

Head vs. Daniels, 38 Kan., 13; 15 Pac., 917.

Loughbridge vs. Bowland, 52 Miss., 560.

Barrelli vs. Wagner, 5 Tex. Civ. App., 449; 27 S. W., 18.

Hall vs. Hall, 12 W. Va., 13.

Craig vs. Fraser, 73 Ga., 246.

Lessee of Paine vs. Moreland, 15 O., 435; 45 Am. Dec., 585.

McDonald vs. Simcox, 98 Pa. St., 619.

Mudge vs. Steinhart, 78 Cal., 134; 20 Pac., 147.

McAllister vs. Guggenheimer, 91 Va., 317; 21 S. E., 475.

The case of Darnell vs. Mack, 46 Neb., 740; 65 N. W., 805, is a most important one in that it overrules the former decisions of that court, and following Cooper vs. Reynolds, decides that where property has been seized under writ of attachment regularly issued and levied the court acquires jurisdiction over the property, so far as to render the custody of its officers lawful, and jurisdiction to that extent is not lost so long as the action remains pending by failure to serve process in the main action upon the defendant. A judgment rendered under such circumstances is proof against collateral attack. This case is valuable, also, as exposing the unreliability of Wade's conclusions

and the falsity of his quotations from and comments upon Cooper vs. Reynolds.

The Supreme Court of Colorado, in the case of Brown vs. Tucker, 7 Colo., 30, recognized and approved the doctrine of Cooper vs. Reynolds. In that case an attempted service was had by publication, pending which and before its maturity, the judgment was entered and the attached property sold. The judgment was sustained in a decision clearly defining the distinction between Pennoyer vs. Neff, 95 U. S., 714, and Cooper vs. Reynolds. Of the Pennoyer case the court said:

> "It was the case of a purely personal action against a non-resident of the state, not in any manner partaking of the nature of an action in rem, the recovery of a personal judgment upon constructive service of process, and the subsequent attempt to subject property to the satisfaction of the judgment. The ruling of the Supreme Court is that it is essential to the jurisdiction of a state court, in such a case, that the debtor have property within the state that can be applied in satisfaction of his indebtedness. Otherwise the judgment is void."

> "The precise point as to the validity of this writ of attachment was under consideration in this court in the case of Cooper vs. Reynolds, 10 Wall., 308, in which the effect of an insufficient affidavit for a writ of attachment was set up to defeat the title to land acquired by a sale under the attach-

ment. The case has often been quoted since, and is conclusive in the federal courts in regard to the validity of their own processes when collaterally assailed."

Matthews vs. Densmore, 109 U. S., 219.

Mr. Justice Matthews, in Heidritter vs. Oil Cloth Co., 112 U. S., 301, quoting Cooper vs. Reynolds, said:

"The kind of process and mode of service could be material only with reference to the nature of the judgment. He could be personally bound only by his coming or being brought personally within the jurisdiction of the court. But the land might be bound without actual service of process upon the owner in cases where the only object of the proceeding was to enforce a claim against it specifically, of a nature to bind the title. In such cases the land itself must be drawn within the jurisdiction of the court by some assertion of its control and power over it. This, as we have seen, is ordinarily done by actual seizure, but may be done by the mere bringing of the suit in which the claim is sought to be enforced, which may, by law, be equivalent to a seizure, being the open and public exercise of dominion over it for the purposes of suit."

The subject has received exhaustive and satisfactory consideration in Bank vs. Richardson, 34 Ore.,

518; 75 Am. St. Rep., 664; 54 Pac., 362, and the principle recognized and enforced in

Oil Mill Supply Co. vs. Noel, 64 O. St., 430; 60 N. E., 604.

Morrill vs. Morrill, 20 Ore., 96; copious note to same; 23 Am. St. Rep., 115.

Wilson vs. R. W. Co., 108 Mo., 588; 32 Am. St. Rep., 624.

Hartzell vs. Vijen, 66 Am. St., 601; 35 L. R. A., 451; 6 N. Dak., 117.

Newfelder vs. Ins. Co., 6 Wash., 336; 36 Am. St., 166.

Hardy vs. Beatty, 84 Tex., 562; 31 Am. St. Rep., 80.

Cuzen vs. Stephens, 123 Mo., 337; 45 Am. St. Rep., 549.

Stevens vs. Reynolds, 143 Ind., 467; 52 Am. St. Rep., 80

Miller vs. White, 46 W. Va., 67; 33 S. E., 332; 76 Am. St. Rep., 791.

McIntosh vs. Augusta Oil Co., 35 S. E. (W. Va.), 860.

In Brown vs. Campbell, 100 Cal., 635, an attachment on any surplus there might be of the proceeds of a trustee sale, without personal service, followed by judgment, was sustained against collateral attack in an exhaustive opinion.

Authorities might be further cited that jurisdiction of the res is acquired in an action at law on a contract by the service and levy of a writ of attachment thereon, and that a judgment subsequently rendered is as to such property, regardless of the character or

defect of personal service, assailable only in a direct proceeding instituted for that purpose, but it is deemed unnecessary. It remains, nevertheless, to consider some of the arguments of counsel in opposition thereto, and some of the authorities relied on to support them. Counsel assume that no service whatever was made in the proceedings, the validity of which they assail, and that the mere service and levy of the writ of attachment can not avail in the absence of personal service, actual or constructive, upon the defendant. This is virtually to assert that no distinction exists between judgments in rem and in personam. We have heretofore endeavored to refute the assertion, and maintain that service was made. We deny, however, that as to the property attached the judgment is void, even in the absence of service, and, while there are authorities to the contrary, they can not prevail in this jurisdiction, where, as stated by Judge Hallett, in Needham vs. Wilson, supra, "the principle here declared is one of general jurisprudence."

Counsel place great stress upon Great Western M. Co. vs. Woodmas M. Co., 12 Colo., 46. The judgments there concerned were the identical ones which Needham vs. Wilson was intended to affect by direct attack. It is in that opinion expressly declared that a judgment in attachment, without complete service, actual or constructive, upon the debtor, is void, and the judgment was reversed for that reason; but in the same case, in 14th Colo., page 90, the Supreme Court of Colorado, in effect, reversed this decision, and expressly declared that "the judgment of a court of general jurisdiction is not void unless it appears from the record itself that the court, in pronouncing it, acted without jurisdic-

tion. A judgment rendered without bringing the defendants into court is not for this reason void, but voidable only, unless the failure to obtain jurisdiction over them appears from the record."

The case of Thompson vs. White, 25 Colo., 226, cited by counsel, was a direct proceeding in attachment. In that case the writ had been levied and recorded, but no copy delivered to the defendant, who shortly afterwards died. Personal service was then attempted upon the executor, which the court refused to sustain. The point stated by the court is that "no jurisdiction to order a sale of the propertyexists until a levy of the attachment is made, which consists of delivering a copy, together with a description of the property sought to be attached, to the recorder, and until the writ is served by delivering a copy to the defendant, if he is a resident, or the equivalent of such service, if such be the effect of a general appearance." It will be noticed, first, that, as in Reynolds vs. Ray, 12 Colo., 108, the principle announced applies only to attachments against the property of resident debtors; and, second, that the question did not arise collaterally. An equally cogent reason for setting aside the judgment is found in the fact that it was based on service upon the executrix, and after the death of the defendant.

The case of Van Wagenen vs. Carpenter, supra, disposes of the point:

> "When an action of a court of general jurisdiction is invoked in attachment proceedings, although its power to act is conferred by a special statute, it, nevertheless, in

exercising such special powers, acts judicially, and is none the less a court of general jurisdiction, because it proceeds according to rules and practice prescribed by the statute. The same consideration of public policy and reasons exist why the record, if silent, should be aided by the same presumptions which obtain in cases of personal service. Whether a writ of attachment is issued as an auxiliary to the main action, or to initiate jurisdiction against a non-resident, to constitute a valid levy of the writ the acts required by the statute must be done, which are the same in both instances, and the purpose to be accomplished the same, to wit, to bring the property under the dominion of the court for the purpose of subjecting it to the satisfaction of any judgment that may be obtained. The rule requiring the seizure of property within the state belonging to a non-resident defendant, as a condition precedent to the exercise of jurisdiction, is a judicial and not a statutory requirement."

The court then says that this conclusion does not militate against Thompson vs. White, supra, "but only recognizes, as applicable to judgments in this class of cases, *the same presumption of jurisdiction upon collateral attack* that obtains in other cases, to wit, that everything necessary to be done was done, unless the contrary appears from the record."

This case was based on the fact that within the limit of two thousand dollars as to amount, the jurisdiction of the County Court of Colorado is general,

and its writs entitled to the same force as those of the District Court in similar cases. Such is the course of our own decisions.

Fletcher vs. Stowell, 17 Colo., supra.
Cody vs. Raymond, 1 Colo., 277.
Hughes vs. McCoy, 11 Colo., 597.
Grignous Heirs vs. Astor, 2 How., 320.
Foster vs. Givens, 67 Fed., 688.
Huxley vs. Harold, 62 Mo., 523.
Tilton vs. Cofield, 93 U. S., 165.
Borden vs. State, 11 Ark., 552.
Howard vs. State, 47 Ark., 441; 2 S. W., 103.
Beauregard vs. New Orleans, 22 How., 14.

We deny the intimation of counsel that Cooper vs. Reynolds has been overruled or limited by the case of Guarantee Trust Co. vs. Green Cove R. R. Co., 139 U. S., 137. As stated by the court in Hunter vs. Ruff, supra:

> "The comments of Justice Brown in the subsequent case can not affect the former, because it was distinguished from the latter by the fact that in Cooper vs. Reynolds the property in question was seized under a writ of attachment on proceeding in rem, while in the latter case there was no attachment."

Indeed, his Honor, Mr. Justice Brown, so carefully distinguished the principle of Cooper vs. Reynolds from the one there involved that it is difficult

to understand how by any system of reasoning a conflict between the two is discernible.

We have examined every case in the reports of this court which in any manner refers to Cooper vs. Reynolds, and no authority has ever been more consistently maintained and enforced.

In Roller vs. Holly, 176 U. S., 405, the court says:

> "The cases in which it has been held that a seizure, or its equivalent, an attachment or execution upon the property, is necessary to give jurisdiction, are those where a general creditor seeks to establish and foreclose a lien thereby acquired. Of this class Cooper vs. Reynolds, 10 Wall., 308, is the most prominent example."

In Chicago R. R. Co. vs. Strum, 174 U. S., 716, Mr. Justice McKenna said:

> "The idea of locality of things which may be said to be intangible is somewhat confusing, but if it be kept up the right of the creditor and the obligation of the debtor can not have the same, unless debtor and creditor live in the same place. But we do not think it necessary to resort to the idea at all, or to give it important distinction. The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a non-resident to the defeat of his creditors. To do it he must go to the domicile of his debtor, and can do it

> only under the laws and procedure in force there. This is a legal necessity, and considerations of situs are somewhat artificial. If not artificial, whatever of substance there is must be with the debtor. He, and only he, has something in his hands. That something is the res, and gives character to the action as one in the nature of a proceeding in rem."

There is no conflict whatever between the line of cases of which Pennoyer vs. Neff, 95 U. S., 714, and St. Clair vs. Cox, 106 U. S., 350, are leading ones, and those we are now considering. In one the judgments were voided as judgments in personam, there being neither personal service nor seizure of property; in the other they were sustained as judgments in rem, in so far as the property seized was affected by them. Thus, in St. Clair vs. Cox, the court says:

> "In Pennoyer vs. Neff we had occasion to consider at length the manner in which state courts can acquire jurisdiction to render *a personal judgment* against non-residents which would be received as evidence in the federal courts; and we held that personal service of citation on the party or his voluntary appearance was, with some exceptions, essential to the jurisdiction of the court."

It is then said that the

> "doctrine of that case applies, in all its force, *to personal judgments* of state courts against foreign corporations."

This distinction has always been recognized by this court. It is manifest wherever the occasion for noticing it has arisen. Thus *Mr. Justice Peckham*, in Insurance Co. vs. Spratley, said:

> "In a suit where no property of a corporation is within the state, and the judgment sought is a personal one, it is a material inquiry to ascertain whether the foreign corporation is doing business within the state, and if so, the service of process must be upon some agent so far representing the corporation in the state that he may properly be held in law an agent to receive such process in behalf of the corporation."

This expressly supports our contention that where the jurisdiction is acquired by attachment over the property of a non-resident corporation, the element of its doing business therein is not essential.

In Fitzgerald Co. vs. Fitzgerald, 137 U. S., 98, it is decided that where jurisdiction has been obtained by service of garnishee process in a proceeding in rem, the court has power to proceed, notwithstanding defect in service on the person. In such case, objection to jurisdiction over the person, to be availing, must not be raised in connection with denial of jurisdiction over the subject-matter. The defendant below having denied the power of the court to proceed at all, and upon decision against it having joined issue and gone to trial on the merits, as jurisdiction existed over the subject matter, it was properly maintained over the person, even though such service

might have been set aside. St. Clair vs. Cox is cited and distinguished.

In view of the unequivocal determination of the question by the authorities above quoted, and of the clear distinction between judgments in rem and judgments in personam, as affected by the service of process, it seems unnecessary to burden the court with an extended review of the many cases cited by counsel in support of their general proposition that judgments in personam, to be valid, must have been rendered after acquiring jurisdiction of the person. They are not applicable to conditions presented by this record, and can serve no other purpose than to demonstrate the extreme industry of counsel.

In the case of Windsor vs. McVeigh, 92 U. S., 274, a different principle is involved. The property of the plaintiff in that case had been confiscated as an act of war, by order of the district attorney, in July, 1863, acting under instructions from the attorney general. A libel in the name of the United States was filed against the property by a process of monition published and posted. It was justly held that a proceeding in rem as an act of war or condemnation for alleged forfeiture, without notice and opportunity to be heard, was an absolute nullity, under which no title to the property could be founded. The decision of this court in that case never has been and never can be questioned. Its essential differences to the case at bar are readily apparent, in that the creditors of the plaintiff in error have here, under the provisions of a statute enacted and universally applicable for the purpose, subjected property within the jurisdiction to the payment of their just claims, and have

made service upon the properly constituted representative of the defendant. Neither an act of war, of confiscation, nor of forfeiture is involved. The proceeding is not only special and provided for immediate emergency, but applicable generally to similar conditions everywhere. It is indeed a significant circumstance that no reference is made in the court's opinion to Cooper vs. Reynolds as in any manner affecting or bearing upon the facts. See

Loaiza vs. Superior Court, 85 Cal., 34; 20 Am. St. Rep., 210.

Milburn vs. Smith, 11 Tex. Civ. App., 682; 33 S. W., 911.

Ex parte Reed, 100 U. S., 23.

The Fred M. Lawrence, 94 Fed., 1017.

Counsel have cited a long list of authorities, beginning with Judge Cooley, in support of the general proposition that neither actual manual seizure of personalty, nor "actual manual occupation" of real property, to say nothing of a mere levy of attachment, is sufficient to give a court jurisdiction to enter a judgment in rem or quasi in rem, without reasonable notice to the defendant. The great bulk of the authorities cited were those in which such adjudication without personal service, or with defective personal service, were sought to be enforced as judgments in personam, or in which the character of service was directly attacked in the particular proceeding. This is especially true of the last seventeen cases, one of which, Westcott vs. Archer, 12 Neb., has been overruled in Darnell vs. Mack, *supra*. The others are wholly against the plaintiff's contention.

Thus Judge Cooley, 403-405, concludes his very clear exposition of the subject by saying:

> "The fact that process was not personally served is a conclusive objection to the judgment as a personal claim, unless the defendant caused his appearance to be entered in the attachment proceedings. When a person has property in a state and resides elsewhere, his property is justly subject to all valid claims that may exist against him there; but beyond this, due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."

Galpin vs. Page is not at all in point. The Supreme Court of California, in a direct proceeding had there, decided against the validity of service made, and consequently of the judgment. This adjudication was held binding on the federal courts. The judgment was in personam and the opinion is in complete harmony with Cooper vs. Reynolds and subsequent decisions of this court.

Freeman vs. Alderson, 119 U. S., declares that a personal judgment for costs can not be rendered against the defendant on default, if citation was served on him by publication only. The court, expressly approving Cooper vs. Reynolds, page 189, says that to its statement of the law

> "may be added what, indeed, is a conclusion from the doctrine, that whilst the costs of an action may properly be satisfied out of

> the property attached, or otherwise brought under the control of the court, no personal liability for them can be created against the absent or non-resident defendant."

In Hassall vs. Willcox, a judgment on mechanics' lien was rendered against a railroad under a statute of Texas, giving same and providing for its enforcement without making defendants of other lienholders. The judgment included amounts not covered by the statutory lien. It was held not to be conclusive against a prior mortgagee, not a party to the suit and having no notice whatever thereof. Had the judgment been limited to the amount covered by the statutory lien, it must have been good *inter partes*, however it might have affected prior lienholders.

Scott vs. McNeal involved the effect of judicial proceedings in probate which assumed to dispose of the estate of a living person. They were held void, as a matter of course. It is difficult to imagine what pertinency this case can have to the questions involved in this record.

It will, of course, be borne in mind that the assumption of no service whatever in the case at bar, is wholly gratuitous. We shall hereafter refer to the fact that plaintiff in the trial of the case below never offered to prove that Jardine was not its process agent, or that his appointment had been revoked. Hence, it is reduced to the present necessity of grounding its assertion of no service on the bare fact that it was made in San Miguel county, when the suit was brought and the property located in Ouray county. The most liberal view that can be taken of this circumstance reduces it to an irregularity, and one made

necessary by the absence of the agent from the county when suit was brought. Hence, it can not affect the jurisdiction of the court in an action like this.

If the judgment had been entered, as plaintiff claims, without personal service, the statutes of Colorado gave it ample opportunity for redress. Section 75 of the Code provides that

> "when, for any cause, the summons in an action has not been personally served on the defendant, the court may allow, on such terms as may be just, such defendant, or his legal representatives, at any time within one year after the rendition of any judgment in such action, to answer to the merits of the original action."

The judgments were rendered, the executions issued, the sales made and recorded all within the year. The citations were mailed to the president of the company. It failed to avail itself of the statutory privilege just cited. It took no steps for years. When the defendant's expenditures had made the property valuable, it brought its action in ejectment, and demands that all previous proceedings against it be declared void.

FOURTEENTH AMENDMENT.

Nor do we admit the application to this case of the provisions of the fourteenth amendment to the Constitution of the United States.

This amendment, which was born of a political emergency and intended to cover a political condition,

has, in recent years, been largely utilized as a channel through which controversies can be piloted directly from the trial courts to this tribunal. We are unable to perceive its application to the facts of this case, beyond its utilization as a method of procedure or review. Its terms are broad and sweeping. They were intended to comprise the domain of national citizenship, and preserve the rights of the individual from the unjust and arbitrary operation of state regulations. Yet, they merely fix that limitation upon the powers of the states which is placed upon those of the national government by the fifth amendment.

Davidson vs. New Orleans, 96 U. S., 101.
Hallinger vs. Davis, 146 U. S., 314.

> "The general scope of the provision requiring due process of law, is to secure to every person, whether citizen or alien, those fundamental and inalienable rights of life and liberty and property which are inherent in every man, and to protect all against the arbitrary exercise of governmental powers in violation and disregard of established principles of distributive justice."

Guthrie, 14th Amendment, page 67.

If this clause of the amendment has been violated by the attaching creditors of the Cosmopolitan Mining Company, it is difficult to understand how the cases heretofore cited as sustaining judgments in rem passed the ordeal of its requirements. Definitions of the term "due process of law" are numerous and familiar. We shall not quote them. It seems sufficient to say that due process is not violated

"when the law is executed according to the customary forms and established usages of the particular state, or in subordination to the principles which underlie them."

Guthrie, page 71.

Missouri vs. Lewis, 101 U. S., 22.

Wynehamer vs. People, 13 N. Y., 378.

Railway Co. vs. Wright, 151 U. S., 470.

Mr. Justice Field, in Pennoyer vs. Neff, supra, defined due process as personal process, where judgments in personam were decreed and sought to be enforced. But, as to proceedings where property is brought under the court's control by seizure, he said:

"The law assumes that property is always in the possession of its owner in person or by agent, and proceeds upon the theory that its seizure will inform him, not only that it is taken into the custody of the court, but that he must look to any proceeding authorized by law upon such seizure for its condemnation and sale. * * * In other words, such service may answer in all actions which are substantially proceedings in rem."

Judge Brannon says:

"While to warrant judgments in personam there must be service of process in the state, or voluntary appearance, yet in all actions in the nature of cases called in admiralty proceedings in rem, such as attachments of property of non-residents, * * *

personal service is not requisite to obtain jurisdiction and give the full relief properly pertaining to the nature of the case."

Brannon, 14th Amendment, 251.

Every presumption in favor of the regularity of our judgments, and of all proceedings thereunder, attaches to courts of final jurisdiction, when collaterally assailed.

1 Black on Judgments, 270-7.

Hughes vs. Cummings, 7 Colo., 138.

Voorhees vs. Jackson, 10 Peters, 449.

Travelers Protective Assn. vs. Gilbert, 41 C. C. A., 180; 101 Fed., 46.

Sommermeyer vs. Sommermeyer, 89 Wis., 66; 61 N. W., 311.

And this is especially true when the court decides upon its own jurisdiction, as was actually done here.

Fairchild vs. Fairchild, 53 N. J. Eq., 678; 34 Atl., 10.

Bruce vs. Osgood, 154 Ind., 375; 56 N. E., 25.

Otis vs. Rio Grande, Woods, 279.

Hahn vs. Kelly, 34 Cal., 391; 94 Am. Dec., 742.

And these aids are extended to defects of service.

1 Black on Judgments, 224.

They apply to proceedings and executions, to the sale of the sheriff and the deed of the purchaser. This

is so by the statute of the state, and by the weight of authority.

3 Freeman on Executions, section 339.

These intendments in favor of regularity, applied to the proceedings of courts of general jurisdiction, are not at all affected by the contention of the plaintiff in error, nor is it apparent that any peculiar or discriminative mode of procedure was resorted to against the plaintiff in error in the proceedings which are now so vigorously assailed. Nor is it apparent that the state is without power to provide proper regulations and procedure for subjecting the property of non-residents to the payment of legitimate claims of resident creditors. The proposition, therefore, resolves itself into the question of whether what is claimed to be a defective service of process, followed by judgment execution and sale, constitutes a violation of the due process clause of the fourteenth amendment to the Constitution of the United States. We assert that it does not, and that the contention has been forced into the record merely to authorize the plaintiff in error to invoke the jurisdiction of this court. The following authorities, bearing generally upon the question, are submitted:

The question whether a proceeding is due process of law, within the meaning of the Constitution, is independent of the question whether it was by a motion or ordinary action, provided the form sanctioned by the state law gives notice and affords an opportunity to be heard.

Iowa Central Ry. vs. Iowa, 160 U. S., 389.

It is within the power of the legislature to authorize a suit against a foreign corporation in personam, and such power is not limited to the allowance of actions in rem only. There is nothing constitutional or fundamental in the method of procedure in an action.

Barnett vs. Chicago Co., 4 Hun., 114.

The statute of Ohio, which authorizes a proceeding in rem against all vessels for debts and liabilities contracted for the use of the same, is not unconstitutional as depriving a citizen of his property without due process of law. The seizure of the boat or vessel is sufficient notice to the owner to confer jurisdiction.

Luther vs. Fowler, 1 Grant's Cases, 176.

Revised Statutes of Texas, article 1230, provides that, when the defendant is a non-resident, the clerk shall address a notice to him, requiring him to appear and answer at a specified time and place, and shall send him a certified copy of the petition. *Held*, that as a judgment against a firm, and against a resident partner, individually bound the firm assets only so far as it concerned a non-resident partner served with notice according to the statute, the statute was not unconstitutional as authorizing a judgment without due process of law.

Sugg vs. Thornton, 132 U. S., 524.

The legislature may authorize service on the agent of a foreign corporation to be the basis for a judgment in personam.

McNichol vs. U. S. Agency, 74 Mo., 457.

"A distinction must be borne in mind between a case where there is no service or no publication, and one which is defective, but which the proper court has judged to be sufficient, and upon such on adjudication rendered a final decree in the case. These principles, so essential to the stability of judicial titles, have had the sanction of the Supreme Court of the United States, and have been vindicated and enforced with great clearness and strength of reasoning in several of its published judgments." Citing Voorhees vs. Bank, 10 Pet., 449; Cooper vs. Reynolds, 10 Wallace, 308.

"Views not in harmony with these have, we are aware, been sometimes held, but their undoubted effect is to encourage the picking of flaws in deeds and judicial proceedings in which confidence has been long reposed, thereby promoting litigation and precipitating upon the community all the manifold evils of insecure titles. It is, in our judgment, a misfortune to any state where these views receive judicial sanction, and especially in the new states where property is rapidly advancing in value."

Smith vs. Pomeroy, 2 Dillon, 414; 22 Fed. Cases, 625.

It is well said by Mr. Guthrie, that

"the question is more legislative than judicial, and in each case the primary in-

quiry must be as to what is the system of law of the particular state, and whether, according to that law, as adjudged by its courts, the proceeding in question is due process; and the secondary inquiry must be whether in that process of law, if followed, there is any violation of the fundamental rights secured by the federal Constitution."

Guthrie, Fourteenth Amendment, page 72, citing

McNulty vs. Cal., 149 U. S., 645.

Kennard vs. Louisiana, 92 U. S., 480.

We take it that a judgment rendered without due process of law will be so independent of the recitals of the fourteenth amendment. The requirement is a fundamental principle of Anglo-Saxon jurisprudence, and lies far deeper than any expressed constitutional inhibition. Unfortunately for the plaintiff in error, the record in this case fails to disclose any disregard of its requirements.

But we deny that the mere assertion in the pleadings that the controversy involves the application of the fourteenth amendment, followed by no proof showing the existence of a constitutional question, gives the right to an appeal direct to this court under the act of 1891. None of the authorities cited by counsel so hold.

Loeb vs. Trustees was one in which the court investigated the right, under the act of 1891, of a party to prosecute an appeal to the United States Supreme Court where it had been claimed in the court below that a state statute was in contravention of the fed-

eral Constitution, and in which it was held that this fact might be ascertained from the opinion of the court.

Connelly vs. Union Sewer Pipe Co., 184 U. S., was a case in which the jurisdiction of the Supreme Court on writ of error to the Circuit Court under the act of 1891, when the constitutionality of a state statute was in question, was held to extend to all cases in which such question is decided against the claim of either party, and, therefore, to include a case in which the writ of error was taken by a defendant, who set up in defense of the action a statute which the court below held unconstitutional.

Holder vs. Aultman Mills Co. was a case in which suit was brought to the Supreme Court from the Circuit Court, under the act of March 3, 1891, and in which the Supreme Court held that its jurisdiction did not depend upon the question of whether or not the right claimed under the United States Constitution has been upheld or denied in the court below, and was not limited to the constitutional question, but included the whole case. The claim had been that under a Michigan statute making void all contracts made in the state by any foreign corporation which had not filed its articles of association and paid its franchise tax, and a contract made elsewhere than in Michigan was valid, although it was to be performed in that state. The court had held that the Michigan statute, so far as it affected the contract in question, was in violation of the Constitution of the United States.

Gear vs. Alkali Works, 190 U. S., 428, was a case in which the service of summons was made in

the state on resident directors of a foreign corporation, and it was held that this was insufficient to give the court jurisdiction of such corporation, where at the time of such service it had ceased to do business within the state, and had designated no agent on whom service could be made. The suit had been brought in the state court and removed to the federal court upon the claim that there was a separable controversy, etc. There is no discussion in this case upon the right to take an appeal to the Supreme Court of the United States, nor any statement as to the clause under the act of 1891, on which it was appealed.

Conley vs. Matheson Alkali Works, 190 U. S., is a similar case in which service of summons was had within the state on resident directors of a foreign corporation, and it was held insufficient to give the court jurisdiction of such corporation, where, at the time of such service, it had ceased to do business within the state, and had designated no agent upon whom service could be made. Evidence was taken before a master on the question of the cessation of business and non-declaration of agent, but the court does not discuss or decide any question with reference to the appeal to the Supreme Court.

Neither of the two last cases decided hold or state that the appeal in fact was taken upon the ground that there had not been due process of law. There is a certificate by Judge Marshall in the record, but under the act of 1891 the only instances in which certificates may be given for the purpose of appeal under the act of 1891 are, (1) by the Circuit Court of Appeals as to questions with reference to which

it desires the advice of the Supreme Court; (2) a certificate by the Supreme Court when the question of the jurisdiction of the Circuit Court has been decided, etc. The certificate by Judge Marshall does not relate to the question of the jurisdiction of the court, so that it would seem that no appeal would lie in this case because of the alleged question with regard to due process of law. There was no claim in the court below and no decision upon any claim, that a state statute relied upon or invoked by either side, was in contravention of the federal Constitution.

The certifying of a question to the Supreme Court by the Circuit Court is discussed in Blythe vs. Hinckley, 173 U. S., 506; the Paquet Jabana, 175 U. S., 684.

Where the question of the jurisdiction of the Circuit Court has been decided, that question alone can go to the Supreme Court or the whole case may be taken to the Circuit Court of Appeals. The election must be made by the appellant.

Maynard vs. Heckt, 151 U. S., 326.

In Cincinnati Ry. Co. vs. Thiebau, 177 U. S., 620, the Supreme Court held that where the constitutionality of a state law was first raised on an assignment of errors in the Circuit Court of Appeals, it would sustain the writ of error under the act of 1891.

Penn. Mutual Life Ins. Co. vs. Austin, 168 U. S., 695, holds that a real and colorable claim that a state statute is unconstitutional must exist.

Carey, etc., vs. Houston, etc., Ry. Co., 151 U. S., 81, holds that it must be the controlling question in the case.

DEFENDANT A STRANGER TO ATTACHMENT PROCEEDINGS.

Although the subject is not discussed in their brief, counsel have nevertheless not overlooked the strength of the defendant in error as a third party to the transaction which they assail. The defendant in error is a purchaser under judicial sale of the premises in controversy. He was not a party to the record of the judgments, and his connection with the premises dates from his purchase of the certificate of sale executed by the sheriff under the statutes of Colorado. The plaintiff in error can not divest his rights as an innocent purchaser which vested before any assault was made upon the judgment, the same being, upon its face, regular and free from uncertainty.

Hunter vs. Ruff, supra.

> "The result deducible from a majority of the cases seems to be that it is only when the judgment appears upon its face to have been rendered without jurisdiction that it can be considered a mere nullity for all purposes."
>
> 1 Black on Judgments, section 218.
>
> 1 Freeman on Judgments, sections 116, 126.
>
> 2 Freeman on Executions, section 308.

This court, in Voorhees vs. Bank, supra, has declared:

> "The purchaser is not bound to look beyond the decree when executed by a convey-

ance, if the facts necessary to give jurisdiction appear on the face of the proceedings; nor to look further back than the order of the court."

Sumner vs. Moore, 2 McLean, 63.

Bank vs. Hughes, 10 Mo. App., 12.

May vs. Logan County, 30 Fed., 255.

Town, etc., vs. Coolidge, 89 Ill., 534.

Tucker vs. Harris, 13 Ga., 10.

Board, etc., vs. Markle, 46 Ind., 110.

Wisdom vs. Buckner, 31 La. Ann., 38.

Bank vs. Peters, 51 Kan., 69; 32 Pac., 628.

Jones vs. Talbott, 9 Mo., 124.

Every doubt should be resolved in favor of the validity of a judgment, where the rights of a bona fide purchaser are involved.

McGowan vs. Lufburrow, 82 Ga., 323; 14 Am. St. Rep., 178.

Hudepohl vs. Water Co., 94 Cal., 388; 28 Am. St. Rep., 149.

A judgment in attachment proceedings is conclusive on parties and privies so far as the attached property is concerned.

Bank vs. Peters, 51 Kansas, 69.

SHERIFF'S SALE CAN NOT BE ATTACKED.

Neither can the sheriff's sale be attacked in this proceeding. It appears from the record that the

premises were levied upon and sold under the execution in the Begole case. (Transcript, pages 72-73.) The return of the sheriff reads:

> "In obedience to the command of the within execution, I have executed the within writ by offering for sale on the 24th day of August, 1895, in the manner provided by law, and selling the property described in said writ, at public sale at the front door of the court house, in the city and county of Ouray, Colo., that said mining claims were first offered for sale separately; receiving no bids on said claims, I offered the same for sale all together. That in accordance with an agreement entered into by and among the several prorating judgment creditors, the same was struck off and sold to J. C. Marsh, as trustee, for the several judgment creditors, for the sum of $1,616.97; and I therefore return this execution fully satisfied."

The court made a prorating order for the distribution of the amount realized from the sale, and the money was distributed accordingly. Whether this was done properly or improperly, lawfully or unlawfully, wisely or unwisely, is no concern of the defendant in error.

Section 2546, Mills' Annotated Statutes, requires the sheriff,

> "upon the sale of lands on execution, to give to the purchaser a certificate in writing, describing the lands or tenements purchased,

> the sum paid therefor, the amount of bid, and the time when the purchaser would be entitled to deed for the said lands, unless the same be redeemed."

A duplicate of this certificate is required to be recorded by the officer. Section 2547 fixes the time of redemption by the debtor at six months. Section 2548 gives an additional three months to the judgment creditors of the debtor. Section 2552 makes the certificate of purchase assignable. Section 2553 provides the form of conveyance to be executed by the sheriff in the event of non-redemption. By section 2525 it is provided that:

> "Any deed so executed shall be evidence that the provisions of the law in relation to sales of land upon execution were complied with, until the contrary shall be shown, and such deed shall be considered as conveying to the grantee therein named all the title, estate and interest of the defendant or defendants in the execution therein named, in and to the lands thereby conveyed, of whatsoever nature the same may be, but which deed shall not be construed to contain any covenant upon the part of the officer executing the same."

A deed complying with these requirements being made, evidence that the provisions of the law in regard to sales were complied with is not the subject of attack in a proceeding like this.

Jackson vs. Spenk, 59 Ill., 404.

Freeman on Executions, section 339.

Jenkins vs. Merryweather, 109 Ill., 647.
Keith vs. Keith, 104 Ill., 397.
Smith vs. Schlink, 62 Pac., 1044; 15 Colo. App., 325.

It is contended that the sheriff's sale is void because the judgment in the Fulton case was void, and one of the executions to be satisfied was issued upon such judgment. Also that the sale was of more than sufficient property to satisfy the other judgments, was void as to the excess, and, being void as to the excess, the entire proceeding is void. The claim that the Fulton judgment is void is a bold assumption, without a line of the record to support it. The proposition is sought to be sustained by the case of Bassick M. Co. vs. Schoolfield, 10 Colo., 46, which involved a direct proceeding on the part of the execution debtor to set aside the sale prior to the execution of sheriff's deed, and the sale was avoided because the special execution directed the sale of mining premises not covered by the mechanic's lien decree. The difference between the facts of that case and the one at bar is obvious. There is no pretense here but that the lien of the attachment and judgment and therefore that the execution extended over and required the sale of all of the property in controversy. If we should, for the sake of the argument, concede the pertinency of the Schoolfield case to the case at bar, reference to the subsequent case of Ryan vs. Staples, 76 Fed., 726, robs it of all value. Ryan vs. Staples was the outgrowth of the Schoolfield case. The title of Ryan resulted from a sale of the premises subsequently made in accordance with the Schoolfield decree. The title

of Staples was based upon the original sale, resulting in the suit of Ryan vs. Staples, in which the Circuit Court of Appeals rejected the decision of the Colorado Supreme Court, validated the sale there overthrown, and sustained the title of Staples. Judge Thayer, page 727, said:

> "We are of the opinion that the decision in Mining Co. vs. Schoolfield can not be regarded as a decision construing a local statute, in such sense that it is binding upon this court. The question whether a judgment is void, or simply erroneous, is one which depends for its determination upon the general principles of the common law, and upon a consideration of all the authorities, excepting in those cases where the decision turns upon the construction of local statutes, which either define and limit the jurisdiction of the court by which the judgment was rendered, or prescribe the manner in which jurisdiction over the parties or the subject-matter shall be acquired."

It also appears in that case that the judgment under which the execution sale was had, and by which Staples acquired his title, had been reversed some days before the sale took place. This fact was not allowed to affect the title of Staples, who, as a bona fide judgment creditor, had redeemed from the prior sale. He was a stranger to the judgment, and, therefore, not bound by the subsequent proceedings affecting its regularity.

The statement that the Fulton judgment was a nullity is wholly gratuitous. The record offered

showed the same service against the same defendant, and ~~levy of attachment on the same property in the same manner as in the other cases. As a~~ judgment was prorata under the statute with the others ~~from it is good against collateral attack.~~

Nor is the claim of an excessive sale any more meritorious. Were this a direct proceeding between the plaintiff in error and its judgment creditors, this contention would be unimportant. As against Walsh, it is absolutely without merit. It appears from the return of the sheriff that the property was first offered in parcels, and then sold en masse. We have seen that, under the provisions of the Colorado Code of Practice, any surplus accruing from the sale of attached property must be paid over to the defendant. It is true that the officer should discontinue his sale when he has realized enough to satisfy his writ. If, however, property be sold en masse, the debtor is protected to the extent to which the amount realized at such sale is increased. Either he or his other creditors are entitled to any surplus resulting from such sale. If, on the contrary, he can realize no more than enough to satisfy the writ, and the sheriff were obliged to reject all bids for a greater amount, he would not only disregard his duty, but violate the most obvious principles of natural justice. Even in such a case, however, the execution defendant should make his application to set aside the sale in seasonable time.

Freeman on Execution, volume II, section 296.

The title of the purchaser is only subject to such equities, liens and conditions of which he may have

had notice, and to the effects of these only as are revealed by the judgment and execution.

De Lany vs. Knapp, 111 Cal., 165; 52 Am. St. Rep., 160.

Williamson vs. Jones, 43 W. Va., 56; 264 Am. St. Rep., 891.

East Tenn. C. & I. Co. vs. Wiggin, 68 Fed. Rep., 446.

Luton vs. Soper, 94 Mich., 202.

Maroney vs. Boyle, 141 N. Y., 462; 38 Am. St. Rep., 821.

Meek vs. Skeen, 60 Fed. Rep., 322.

Duff vs. Randall, 116 Cal., 226; 58 Am. Rep., 158.

The manner or regularity of the execution sales in no manner affects the jurisdiction of the court, either of the subject-matter or of the parties. Hence, they can not be inquired into in a collateral proceeding, where the record assailed is proof against all attack not founded on want of jurisdiction.

Murfree on Sheriffs, section 704.

Osgood vs. Blackmore, 59 Ill., 261.

Rigney vs. Sewell, 60 Ill., 416.

The five cases cited by counsel in support of their proposition that, "where more property is sold at a single judicial sale than is sufficient to pay the judgment, the whole sale is utterly void," are neither "numerous nor unanimous." If they were, they could not affect the rights of the defendant in error as a bona fide purchaser for value.

Peterson vs. Corneal, 3 A. K. Marshall, 618, arose under a statute expressly forbidding the sale of a greater portion of the debtor's property than might be necessary to pay the judgment and costs. No precedent levy of attachment, or otherwise, had been acquired of the property sold, and it clearly appeared that the statute had been violated.

Blakely vs. Albert, 3 Dana, 185, was a sale under a decree, prohibiting the sale of more than sufficient property to satisfy the claim. The sale violated the order, and was set aside on objection to its confirmation.

Lockwood vs. Sturtevant, 6 Conn., 373, was an executor's sale, made by order of court and in violation thereof.

In Hastings vs. Johnson, 1 Nev., 613, the sale was held void because the amount inserted in the execution was grossly in excess of the amount of the judgment, and, the execution being declared void, the sale thereunder was a nullity.

Adams vs. Morrison, 9 N. H., we have been unable to find.

A sale may be vacated in direct proceeding for various irregularities if instituted in time, but it may not be attacked as the attempt has been here made.

Freeman on Executions, section 308.

They are sometimes void, but not because more money was realized therefrom than the amount called for in the execution under which the sale is made. Mr. Freeman, Executions, sections 283 and 339, instances the various judicial sales which are void. The defect contended for by counsel is not among them.

If made by fraudulent combinations of bidders, or after sunset, or at the wrong place, or en masse in some states, or for less than two-thirds of appraised value in others, or for the benefit of the sheriff or his deputies, or in defiance of the directions of the law, or the decree, or of personalty when it is not present, or of personalty when the part sold is not segregated, or on satisfied judgments, or made privately, or under process forbidden to issue, they are nullities. Otherwise they are voidable at the worst, and titles acquired by innocent purchasers can not be affected by them, if the defects are not taken advantage of before deed issues for the property affected.

In short, their claim that the Fulton judgment was in any way connected with the other judgments, or united with them in the order of sale, reduced the case to one in which the sale was made for more than the amount of the valid judgments, and the excess, instead of being paid to the judgment debtor, as the statute provides, was wrongfully, utterly without authority, let it be conceded, or upon a void order, paid to Fulton, leaving the rightful owner with a claim against the sheriff or Fulton, but the sale remains absolutely valid, the executions are valid, and the title conveyed by the sheriff's deed perfect. Were this not so, and had there been a wrongful sale of more property than was necessary, it would be voidable, not void, and could not be assailed collaterally, as is pointed out in section 34 of Freeman on Void Judicial Sales, 4th edition. On the other hand, if the Fulton judgment was entered under the pro rating statute, from which it seems that he did all the statute required, then his judgment attached to the lien and the judgment obtained in the Begole and other cases, and

it would seem that the showing as to citizenship, doing of business, and the like, would be treated as being in one proceeding initiated by the Begole judgment, and therefore the Fulton judgment was valid and should have been admitted.

The fact that the judgments were in personam in form is not material. This in nó manner militates against their validity as judgments in rem.

> "The judgment of the court, though in form a personal judgment against the defendant, has no effect beyond the property attached in that suit. No general execution can be issued for any balance unpaid after the attached property is exhausted."

Cooper vs. Reynolds, supra.

Brown vs. Tucker, 7 Colo., supra.

Johnson vs. Dodge, 19 Iowa, 106.

Payne vs. Witherspoon, 14 B. Mon. (Ky.), 270.

Mickey vs. Stratton, 5 Sawyer, 475.

Packard vs. Matthews, 9 Gray, 311.

Barrelli vs. Wagner, 5 Tex. Civ. App., 445; 27 S. W., 17.

The executions issued by the Ouray County Court were special, directed against the attached property, requiring the sheriff to sell them, and them only, for the satisfaction of the respective judgments. This mandate was implicitly obeyed, and satisfaction of the judgments resulted. The form of the judgment entries, the manner of the sale, the return of the officer, and the distribution of the proceeds by the County Court, are matters affecting the plaintiff in error, the officers and the distributees. They can not disturb the title of the defendant in error, or subject him either to liability or annoyance. As to this branch of the controversy, we may say, in the language of Mr. Justice Miller, that:

> "There is a sufficient writ of attachment, its levy and return, the judgment of the court, * * * the order to sell the property, the sale under the writ of *conditioni exponas*, the writ of possession, sheriff's deed and actual delivery of possession under order of the court. To hold them void is to overturn the uniform course of decisions in this court, to unsettle titles to vast amounts of property, long held in reliance on those decisions, and, in our judgment, would be to sacrifice sound principle to barren technicalities."

THE PLAINTIFF'S ~~FIFTH~~ FIFTH SPECIFICATION OF ERROR—THE JUDGMENT QUIETING TITLE.

This relates to the record in the case of Walsh vs. Cosmopolitan Mining Company and J. M. Jar-

dine, instituted by plaintiff in the District Court of Ouray county, on the first day of March, 1897, under section 255 of the Colorado Code, providing that

> "an action may be brought by any person in possession by himself or by tenant of real property against any person who claims an estate therein adverse to him, for the purpose of determining such adverse claim, estate or interest;"

and in which, on the 11th day of May, 1897, a decree (Transcript, pages 49-51) was duly entered in accordance with the recitals of the complaint. The summons in that case was served as to the defendant by delivering a copy thereof, together with a copy of the complaint, in Ouray county, to John M. Jardine, the duly authorized agent of the defendant company, and designated by it as the person upon whom process should be served. Jardine was himself made a party to the action, but filed a disclaimer (Transcript, page 46), alleging that his interest in the controversy arose from the fact that the summons in the original actions had been served upon him as agent of the defendant company, which writs he had duly mailed to the president of the company, with postage fully paid thereon, in envelopes with return card printed thereon, which letters were never returned to him, in consequence of which he allowed judgments to be taken without interposing any defense on the merits, since which time and the sale of the premises he had not claimed or pretended to claim any interest therein adverse to the plaintiff.

The objection of the plaintiff in error to the admission of this record goes to the manner of service, to the recitals of the decree, and to its alleged failure to state that the defendant company at the time of suit was doing business in the state.

CHARACTER OF SERVICE.

The argument heretofore urged in support of the judgments in the attachment suits considered as personal judgments rendered upon valid legal service need not be repeated here, for the service is in all respects the same, except that it was made upon Jardine, who was found within the limits of Ouray county, and the return refers to him as the agent designated by the defendant company for the service of process upon it. In addition to these facts, it may be stated that the plaintiff alleges, and the decree determines, that the defendant company was organized to do business in the county of Ouray, state of Colorado; a circumstance to which his Honor Judge Marshall adverted in overruling the plaintiff's objection to the introduction thereof. His Honor said (Transcript, page 57):

> "That it appears by the decree of the court that this corporation was organized to do business in the state of Colorado; that that was one of the objects for which it was organized; that it did appoint an agent under the law of Colorado who was authorized by the corporation to receive service of process, so that the authority of this agent to re-

> this service appears affirmatively on the face of this record. * * * He was authorized by the corporation to receive service of process in the state of Colorado—that is the allegation—and that the corporation was by its charter not only authorized but was formed for the very purpose of carrying on a part of its business in the state of Colorado. I think it sufficiently appears in this suit to quiet title that the court has jurisdiction of the defendant."

It will be observed that the service in this case in all respects complies both with the Code and section 499. The former requires service on an agent *found* in the county. The place of his residence is immaterial. The latter designates the agent on whom process *may* be served, without reference to the venue of the suit. If such service does not bring the company under the jurisdiction of the court, what does?

The disclaimer of Jardine, being a part of the record, is important. It discloses that actual notice of the previous suits was given to the president of the plaintiff in error, and that the failure of the agent to make a defense to them resulted from the failure of the president to respond to the notices. Counsel have sought to distort this appearance and disclaimer by asserting its disclosure of some collusive understanding or arrangement between Jardine and Walsh, whereby the interests of the defendant company were prejudiced. We do not care to notice this insinuation farther than to remind both court and

counsel that no charge of fraud appears, either in the pleadings, testimony or the assignment of errors. The judgments forming the basis of our title are not assailed for any such reason. No such claim was made below or in the pleadings. No opportunity has been given defendant to meet it or to test the good faith of plaintiff in bringing or prosecuting this action. Hence the reflections of counsel are not only unworthy of them, but entirely out of place in the consideration of the questions involved in this record.

IS DECREE IN PERSONAM OR IN REM?

The record in this, as in the other judgments, is assailed wholly upon the ground that the proceeding is one in personam, and therefore void. Thus counsel say that

> "the court erred in admitting in evidence the record in the Walsh case, first, because the action was one in personam and not in rem; second, because it nowhere appears in the record that the defendant company was doing business in the state of Colorado when service was made upon Jardine; and, third, the court attempted, by the mere force of its decree, to establish a title in Walsh."

We might concede the personal character of the case in Walsh vs. Cosmopolitan M. Co., and still successfully contend for its validity under all the authorities heretofore cited, as the service was personal and made in all respects as required by both

the Code and the General Statutes concerning foreign corporations. But here again counsel labor under a delusion. The proceeding is a statutory one, and partakes of all the characteristics of a proceeding in rem. In all essential respects the proceeding is one in rem, and has been so decided on more than one occasion by this court.

The general proposition that in the rendition and enforcement of decrees a court of equity acts upon the person may be conceded, as well as the other proposition that a decree will not of itself effect a conveyance. Both of them are in harmony with the now conceded doctrine that statutory proceedings to quiet and remove clouds from title partake of the nature of proceedings in rem, and that a decree adjudicating that a defendant has no title needs no further affirmative action for its effectual operation.

Counsel quote correctly from the opinion of Mr. Justice Gray, in Hart vs. Sansom, 110 U. S., 151. A bill in that cause was filed in virtue of the general jurisdiction of a court of equity for the removal of a cloud upon title, and it could have had no basis elsewhere. The statutes of Texas were expressly declared by Mr. Justice Gray to have no relation to the subject-matter of the suit. Not only so, but his Honor expressly declared that the only part of the decree in that case affecting Hart's interests was that relating to costs.

The case of Arndt vs. Griggs, 134 U. S., 316, was a bill to quiet title, brought under the provisions of sections 37 and 38 of the compiled laws of Nebraska, both of which sections, together with sections 77, 78, 82 and 429-b of the Nebraska Code are quoted by Mr.

Justice Brewer in the opinion. It is there expressly declared that by well settled rules an action to quiet title is a suit in equity, that equity acts upon the person; and that the person is not brought into court by service by publication alone; but they do not apply when a state has provided by statute for the adjudication of title to real estate within its limits as against non-residents who are brought into court only by publication.

> "The question is not," says the court, "what a court of equity, by virtue of its general powers and in the absence of a statute, might do, but it is, What jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts to determine the validity and extent of the claims of non-residents to such real estate? If a state has no power to bring a non-resident into its courts for any purposes by publication, it is impotent to perfect the titles to real estate within its limits held by its own citizens; and a cloud cast upon such title by a claim of a non-resident will remain for all time a cloud, unless such non-resident shall voluntarily come into its courts for the purpose of having it adjudicated. * * * It has control over property within its limits; and the condition of ownership of real estate therein, whether the owner be stranger or citizen, is subjection to its rules concerning the holding, transfer, liability to obligations, private or public, and the modes of establishing title

thereto. It can not bring the person of a non-resident within its limits—its process goes not out beyond its borders—but it may determine the extent of his title to real estate within its limits; and for the purpose of such determination may provide any reasonable methods of imparting notice. The well-being of every community requires that the title of real estate therein shall be secure, and that there be convenient and certain methods of determining any unsettled questions respecting it. The duty of accomplishing this is local in its nature; it is not a matter of national concern, or vested in the general government; it remains with the state; and as this duty is one of the state, the manner of discharging it must be determined by the state, and no proceeding which it provides can be declared invalid, unless in conflict with some special inhibitions of the Constitution, or against natural justice. So it has been held repeatedly that the procedure established by the state, in this respect, is binding upon the federal courts."

A review of many decisions upon the same subject follows, and copious quotations made from some of them. It is then expressly declared that the jurisdiction of a court over the controversy is founded on the presence of the property, and, like a proceeding in rem, it becomes conclusive against the absent claimant as well as the present contestant.

The previous decision of Hart vs. Sansom is then clearly defined.

"The question there was as to the effect of the judgment. * * * That judgment was that the plaintiffs recover of the defendants the premises described; 'that the several deeds in plaintiffs' petition mentioned be, and the same are hereby, annulled and cancelled, and for naught held, and that the cloud be thereby removed;' and for costs, and that execution issue therefor. This was the whole extent of the judgment and decree. Obviously, in all this there was no adjudication affecting Hart. As there was no allegation that he was in possession, the judgment for possession did not disturb him; and the decree for cancellation of the deeds referred specifically to the deeds mentioned in the petition, and there was no allegation in the petition that Hart had anything to do with those deeds. * * * An additional ground assigned for the decision was that if there was any judgment (except for costs) against Hart, it was, upon the most liberal construction, only a decree removing the cloud created by his pretended claim of title, and therefore, according to the ordinary and undisputed rule in equity, was not a judgment in rem, establishing against him a title to the land. But the power of the state, by appropriate legislation, to give a greater effect to such a decree was distinctly recognized, both by the insertion of the words 'unless otherwise expressly provided by statute,' and by adding: 'It would doubtless be within the

> power of the state in which the land lies to provide by statute that if the defendant is not found within the jurisdiction, or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose.' "

The decision in Arndt vs. Griggs justifies the assertion that Hart vs. Sansom has no application to the case at bar, the latter being founded upon a statute in all essential particulars like that of Nebraska. The service against the Cosmopolitan Company was upon an agent and not by publication. It is, therefore, a stronger case than the one cited.

The estate claimed adversely, under section 255, Colorado Code, may be any sort of a claim, legal, equitable or otherwise asserted, or about to be asserted, by one out of possession. And it clearly applies to residents and non-residents alike, for, by section 2535 of Mills' Annotated Statutes, it is provided that:

> "In all actions pending in any court of record in this state, or which may hereafter be brought in any such court, wherein any defendant is not found within the jurisdiction of the court, and constructive service alone is had, and which is brought for the enforcement of an express, implied or resulting trust, or for the removal of cloud from title to real estate, or for specific performance, or for the establishment of a lost or destroyed deed, conveyance or instrument in writing not properly proved and acknowl-

edged, or in any other proceeding in rem, or affecting only specific property, where, according to the usual practice in courts of chancery, the court, if the defendant had been properly served, might direct or decree any act to be done or performed by the defendant in favor of plaintiff, the court may appoint a trustee for such defendant to do and perform, in the place and stead of and for such defendant, the acts required by the decree rendered in any such cause. Any act lawfully done by such trustee, under and in pursuance of any such decree, shall be as binding and effectual for all purposes as if done and performed by the defendant in pursuance of such decree."

The sections quoted endow courts of equity with full power and authority to settle title to real estate within the boundaries of the commonwealth as against all persons, including non-residents. To deny, in Walsh vs. Cosmopolitan Company, the efficacy of a decree in rem affecting real estate is virtually to deny the efficacy of our statutes and the authority of Arndt vs. Griggs, the doctrine in which has been recognized and enforced in

Perkins vs. Wakeham, 86 Cal., 583; 21 Am. St. Rep., 70; 25 Pac., 52.

Lantry vs. Parker, 37 Neb., 357; 55 N. W., 564.

People vs. Simon, 176 Ill., 177; 68 Am. St. Rep., 184; 52 N. E., 915.

Corson vs. Shoemaker, 55 Minn., 399; 57 N. W., 139.

Porter Co. vs. Baskin, 43 Fed., 328.

Lynch vs. Murphy, 161 U. S., 251.

Knudson vs. Litchfield, 87 Iowa, 121; 54 N. W., 201.

Oldham vs. Stephens, 45 Kan., 371; 25 Pac., 864.

Scarborough vs. Myrick, 47 Neb., 800; 66 N. W., 869.

Association vs. Matthews, 13 Tex. Civ. App., 425; 35 S. W., 691.

Connor vs. Tenn. Central Ry. Co., 109 Fed., 931.

Tyler vs. Judges of Registration (Mass.), 55 N. E., 812.

In Hamilton vs. Brown, 161 U. S., 275, the doctrine of Arndt vs. Griggs is not only expressly approved, but emphasized by the fact that the case arose in Texas, under a statute providing for the escheat of land of persons dying intestate and without heirs. The proceedings were had on scire facias, followed by a judgment in favor of the escheat. The proceeding was held to be conclusive upon the persons named in the petition, the court expressly declaring it to be within the power of the legislature of Texas to provide for determining and quieting title to real estate within the limits of the state, and within the jurisdiction of the court after actual notice to all known claimants, and notice by publication to all other persons.

Cooper vs. Newell, 173 U. S., 555, presented the question whether the judgment of the District Court of Brazoria county, Texas, in favor of one McGrael

against Newell was open to the attack made upon it in the Circuit Court of the United States for the Eastern district of Texas. The judgment assailed was rendered in an action at law known as trespass to try title, no service having been made upon Newell, for whom an attorney without any authority entered an appearance. It was held that the judgment could be so attacked. Apart from the fact that the action was not one to quiet title, the court again declared it to be within the power of the legislature of Texas to provide for determining and quieting title to real estate on the authority of Arndt vs. Griggs, and emphasized the fact, and that no such statute existing at the time of the commencement of McGrael vs. Newell, it could, therefore, be regarded as only a personal action and coming within the rule laid down in Pennoyer vs. Neff.

> "The record does not show that any process was issued on the petition and served on Newell, or any notice given to Newell by publication or otherwise, or affirmatively that the person signing the demurrer and pleas was authorized to do so."

In Roller vs. Holly, 176 U. S., 398, another case from Texas, the doctrine of Arndt vs. Griggs was reaffirmed, but the notice of the suit requiring a defendant residing in Virginia to appear and answer the suit in Texas within five days was declared unreasonable, and therefore the judgment rendered on such service was not binding upon the defendant.

The case of Wall vs. Magnes, 17 Colo., 476, cited by counsel, very properly declares that section 255

of the Colorado Code simply recognizes, in statutory form, the former chancery proceeding. That is merely a statement of a self-evident fact. The same remark is equally applicable to the Nebraska statute involved in Arndt vs. Griggs. The Colorado case was, however, *one between two citizens of that state*, and, therefore, involved neither a consideration of section 2535, Mills' Annotated Statutes, nor the application of the Code to *adverse claims of non-residents*. It will not be asserted that the old equity proceeding could be made to operate in rem under any circumstances, and can not be successfully contended that the Colorado statutes heretofore quoted only become effective in cases where actual personal service of the defendant is obtained. Such a construction would defeat both the language and the purpose of the sections.

We have found nothing in the other cases cited by counsel in this division of the argument to militate against our proposition. United States vs. Bell Tel. Co., 29 Fed., 17, was a suit brought to cancel, or, failing in that, to modify certain patents to Graham Bell, and owned by the defendant. Service was had upon the officers of two subsidiary companies in Ohio, alleged to be the agents and partners of the foreign corporation. A motion to quash and plea in abatement were filed on special appearance by the defendant, and both were sustained. Not the slightest element of a proceeding in rem is disclosed in any stage of that proceeding. Not only so, but it appeared that the parties served were neither partners, nor managing agents, nor were there other representatives of the defendant company in Ohio.

The same comments are equally applicable to the case of Henning vs. Planters Ins. Co., 28 Fed., 440.

The cases of Swan vs. Ins. Co., 100 Fed., 922, and Friedman vs. Ins. Co., 101 Fed., 535, have been confessedly overruled by the case of Insurance Co. vs. Phelps in this court, in 190 U. S., hence we think no serious attention need be given them.

People vs. Com. Alliance Ins. Co., 40 N. Y. S., 269, was a claim against a receiver, based upon a judgment previously recovered against it in Maine. It was a judgment in personam, obtained upon service after the company had formally withdrawn from the jurisdiction of that commonwealth, and therefore rendered without jurisdiction. The same criticism is applicable to Mutual Reserve Assn. vs. Boyer, 61 Pac., 387.

In Millan vs. Insurance Co., 103 Fed., 764, the defendant having long prior to the action ceased to do business in the state, and expressly revoked its agent's authority, the court, on motion to quash, held that jurisdiction to render a personal judgment against a non-resident can only be acquired by personal service of writ of summons on the party or by his voluntary appearance. It appears that in each of these instances the defendant company had formally withdrawn its legal presence and agents from the state in which the action was brought. With the exception of Hart vs. Sansom, none of them were actions either to quiet title or remove cloud therefrom. On the contrary, they were based upon some personal demand, or to enforce some personal claim. If the Virginia case, for example, had been one to quiet title to real estate in the commonwealth of Virginia, or the seizure of property by way of attachment, the decision would not have been here quoted by plaintiff in error.

But the distinctive feature of the court's decision consists in the fact that the service was not made in accord with the act of May 18, 1887, relating exclusively to assessment companies. It was held that the other statutory provisions relating to foreign corporations in general could not apply to assessment companies, and the act expressly applying to them must be observed in the manner of serving process.

Eureka Co. vs. California Ins. Co., 130 Cal., 153; 62 Pac., 393, was a suit upon a foreign judgment in personam, and obtained in the state of Alabama. The Supreme Court of California held that the defendant was entitled to show that it had ceased doing business in Alabama, and had no agent there at the time of the pretended service, default and judgment.

De Castro vs. Telephone Co., 76 Fed., 425, merely recognizes and enforces the doctrine of this court in Goldey vs. Morning News, 156 U. S., 518. Judge Lacomb very tersely held that:

> "Since it appear that for some time prior to the service of the summons, defendant had ceased to do business in this state, and had no property within this jurisdiction, it could not properly be found here for purposes of service."

On motion for reargument, he held that whether the defendant company had property was not material, since no effort was made to acquire jurisdiction of the defendant through its property by attachment or similar proceedings.

Guthrie vs. Indemnity Co., 101 Tenn., 673; 49 S. W., 829, was a judgment in personam reversed on direct appeal. The application of the Statute of Limitations to the cause of action was the principal point in the case. We have no quarrel, however, with any part of the opinion. To secure personal judgments against them they "should be found doing business in the state with persons or concerning property, however slight." We may treat the Walsh judgment as strictly in personam upon the authority of this Tennessee case, which, in turn, is well supported by the opinion of this court in Goldey vs. Morning News, 156 U. S., 518:

> "A judgment rendered in the court of another state against a corporation neither incorporated nor doing business within the state must be regarded as of no validity in the courts of another state or of the United States *unless service of process was made in the first state upon an agent appointed to act there for the corporation*, and not merely upon an officer or agent residing in another state and only casually within the state, and not charged with any business of the corporation there."

This case is authority for our contention that where summons is served upon an agent designated as required by the statute as a person upon whom process may be served, such service brings the corporation within the jurisdiction of the court, so far, at least, as may be necessary to make its judgments

conclusive upon property which is the subject of the action.

Hazeltine vs. Insurance Co., 55 Fed., 743, was a suit brought upon and to enforce a judgment in personam theretofore obtained in the courts of the state of Maine. The company having ceased to do business, and having withdrawn its agents when the suit was brought, the judgment was held open to collateral attack. The fundamental distinction between the cases relied upon by plaintiff in error and the one at bar is, that, with the exception of Hart vs. Sansom, the service was challenged in the case itself, by motion or other appropriate proceeding, or the suits were founded on foreign judgments in personam sought to be enforced and made effective in other jurisdictions. The defendant in error has here claimed, and is claiming, nothing against the plaintiff in error beyond the application of the judgments to the premises involved. The plaintiff in error, regarding the judgment as one strictly in personam, assumes it to be an absolute nullity, and upon such premises seeks to demolish the title of defendant in error in a collateral proceeding. It is quite evident that the judgment must be a nullity to justify its argument. It can not be a nullity, whatever else may be said of it, if the court had jurisdiction of the res, and was empowered by statute to determine and settle the title.

But counsel insist that the record must affirmatively disclose that the company was doing business in the state at the time of suit brought, or it was not amenable to service of process at all. If that be true, process by publication would be worthless, since the affidavit upon which it must be based would neces-

surily allege, in substance at least, that the corporation was not doing business in the state; and we have seen that under the federal authorities the requirement of doing business is not essential where the purpose of the proceeding is to reach, dispose of, or affect property within the jurisdiction.

On the other hand, no authority cited has adjudged that the record must expressly recite somewhere within its bounds that the company was doing business at the time of suit brought. If that fact can be gathered from the four corners of the record, its direct recital is dispensed with. Both the petition and the decree in the Walsh case allege that the defendant company was organized to do business in the county of Ouray, in the state of Colorado; that it afterwards designated J. M. Jardine, under the laws of Colorado, as its authorized agent, upon whom process might be served; that suits in attachment were begun against it in April and May, 1895, and writs of attachment were levied upon the property in controversy, and summons and writ duly served upon the defendant company by delivering the same to the said Jardine; that judgments were duly rendered in said causes, special execution issued and the property sold, for which the deeds of the plaintiff therefor were duly executed to the holder of the certificate of purchase, and that defendant pretended and claimed that it still held some interest in the premises adverse to the plaintiff. These recitals collectively establish the fact that the company was in the state as a corporation to the extent that the court acquired jurisdiction of it for the purposes of the action and decree through the service of summons upon its duly authorized agent.

Indeed, we may safely affirm that, if the defendant in error or the plaintiffs in the attachment suits, or both, had endeavored to secure service of process by affidavit and publication, instead of delivering the writs to Jardine, the plaintiff in error would be here contending against the validity of such service because of its presence in the state, through its designated agent, upon whom the process should have been served. We have patiently examined every case cited by counsel, and every other authority known to us bearing upon the subject, and we confidently affirm that the courts have never decided against the validity of such a service of process in an action brought, as the Walsh case was, to confirm the title of the plaintiff against some alleged adverse claim of a foreign corporation. We assert that the decree quieting title, and the record supporting it, show jurisdiction of the person and of the property. It is valid, whether considered as a decree in personam or in rem, or both, and proof against either direct or collateral attack.

Indeed, counsel are forced to admit that their reliance is, after all, upon the case of Hart vs. Sansom, notwithstanding the very comprehensive limitation of the authority of that case, as outlined in Arndt vs. Griggs.

FORM OF DECREE.

It remains to notice the contention that the District Court of Ouray county attempted, by the mere force of its decree, to establish a title in Walsh without compelling a deed to be executed by or on behalf of the Cosmopolitan Company. If the court had found

that the Cosmopolitan Company possessed any title or claim of title whatever, the quieting of which was essential to the relation admitted, it should have provided for the execution of its decree by the making of a conveyance in accordance therewith, as required by the provisions of section 2535, Mills' Annotated Statutes; but, unfortunately for plaintiff in error, its finding was that the plaintiff is in the actual peaceable possession of the above described premises, is the owner in fee thereof, and is engaged in working and developing the mining claims aforesaid, and expending thereon large sums of money for the purpose of proving and establishing their value, and that the pretended claim of The Cosmopolitan Mining Company is wholly without right or justification in law, and that the plaintiff is the owner in possession, and entitled to the quiet and peaceable possession of said claims, and each of them. We submit that the decree is conclusive of the plaintiff's title, and of the fact that the defendant has none. The law never recognizes the performance of a needless task, and, if the defendant had no title, it is difficult to perceive what office could be performed by a conveyance to Walsh by it or on its behalf.

The subject is discussed by Mr. Pomeroy, Equity Jurisprudence, volume 1, sections 134, 135 and 170, and the distinction between decrees requiring subsequent positive action for their enforcement, and those which operate *ex proprio vigore* is clearly drawn. This author says that:

> "It is a complete confounding of the essential fact with the external form, to say

that such a mere method of procedure, adopted solely from considerations of policy, determines the nature of the equitable jurisdiction, and demonstrates the non-existence of any equitable primary rights, estates and interests. If there had been any necessary connection between the proceedings and remedies of chancery and this mode of enforcing its decrees *in personam*, if it had been intrinsically impossible to render these decrees operative *in rem*, then the argument would have had some weight; but, in fact, there is no such connection, no such impossibility; the decrees of a court of equity may be made to operate *in rem* to the same extent, and in the same manner as judgments at law. Furthermore, whatever plausibility there might be in the theory as applied to the English court of chancery has been entirely destroyed by the legislation of this country. The statutes of the several states have virtually abolished the ancient doctrine that the decrees in equity can only act upon the person of a party, and have generally provided that in all cases where the ends of justice require such an effect, and where it is possible, a decree shall either operate *ex proprio vigore*, to create, transfer, or vest the intended right, title, estate, or interest, or else that the acts required to be done in order to accomplish the object of the decree shall be performed by an officer of the court

acting for and in the name of the party against whom the adjudication is made."

See, also,

3 Pomeroy, Equity Jurisprudence, section 1317.

In many instances clouds upon title, or adverse claims to property, are of such a character as to require for their settlement a conveyance from the defeated to the successful party. In others, the legal title may be vested in the defeated party, but should be conveyed to the successful one for his complete and adequate relief. In such instances, the decree can not, in the absence of an express statute, become self-executing, and must be followed by a conveyance by, or for, the person decreed to make it to the person decreed to receive it; but, where the decree is confirmatory only, and followed by an express declaration that the defendant has no title whatever, the requirement that the defendant should make a conveyance to the complainant would resolve itself into an absurdity.

In Root vs. Woolworth, 150 U. S., 401, it is declared that a decree which establishes title in complainant carries with it a right of possession as effectually as if it made specific provision to that effect.

Where defendant's grantor alleged that a trust deed from plaintiff's grantor was contrived and made to defraud creditors, a finding to that effect, and a judgment declaring the deed null and void, confirmed

the title of defendant's grantor as a purchaser at the execution sale without any decree to that effect.

Macklin vs. Schmidt, 104 Mo., 361; 16 S. W., 241.

A. obtained a decree in chancery
"that the title to the slave G. be vested in complainant on the 9th day of July, or at any time thereafter, by his paying to B., $130, the amount of B.'s lien on the said slave."

Held, that said decree vested the legal title to the slave in A.

Banks vs. Wilks, 20 Tenn., 279.

The object of the Walsh suit was to secure an adjudication upon the defendant's adverse claim. The decree forever disposed of it by declaring it to be entirely without foundation. Such a decree can establish no title, and, therefore, can require no conveyance.

But, in any event, the alleged defect in the decree can not be availed of by the plaintiff in this proceeding. If the court had no jurisdiction of the parties or the premises the most perfect decree would be a nullity. If it had such jurisdiction an imperfect or incomplete one would be good against collateral attack. If aggrieved by a defective adjudication, the plaintiff's remedy is by direct proceeding in the court which made it.

REJECTION OF EVIDENCE.

Counsel's complaint that plaintiff was not permitted "to prove that it was not doing business in the

state of Colorado except by having a statutory agency, or, in other words, that the authority of the statutory agent had not been revoked of record at the time service was made upon Jardine in the case of Walsh vs. Cosmopolitan Company," is not entirely clear. The defendant not only asserted, but proved, there had been no such revocation, and contended for the continuation of the agency until such revocation. No evidence on the subject pro or con was offered by the plaintiff.

The question asked the witness Story, to which defendants' objection was sustained, was: "Will you please state at that time whether there were any other agents of the Cosmopolitan Company in the county of Ouray, than John M. Jardine?" Mr. Preston then offered to prove by the witness (page 99) that at the time of the service of summons in the Walsh case the corporation had no visible office in Ouray county; that it had no agents upon whom process could be served, and *that it was not engaged in the manual carrying on of the mining business at that time.* The court then inquired if he offered to prove that it had no agent upon whom process might be served, whereupon Mr. Preston said: "I do not make it that broad —any other than John M. Jardine, the alleged statutory agent." The court properly excluded the offer.

Counsel then withdrew his offer and (folio 168) made a more comprehensive one, objection to which was overruled. He then attempted to support it by specific inquiries and wholly failed to do so. Hence the error assigned as to this branch of the case fails completely.

Apart from the fact that the offer virtually conceded the statutory agency of Jardine, a proof that

the corporation was not at the time employed in the *manual* business of *mining* was wholly irrelevant. The business of mining is by no means confined to manual labor. The company was organized to buy, sell, lease, own, improve and work mines. Some of these things would require manual operations and some would not.

Plaintiff's right to dispute the return of the officer might be recognized, but the proof offered did not so much as dispute it by implication. No evidence tending to dispute or contradict it at all was offered.

In conclusion, we respectfully submit that the judgments of the County Court of Ouray county, through which defendant derives his title, and the decree of the District Court of Ouray county confirming it, are valid. The courts rendering them had jurisdiction at all times of the person of the plaintiff in error and of the property in controversy, either of which suffices to shield their proceedings from collateral attack, however directed.

The plaintiff in error is in no legal sense aggrieved. It knew of the pendency of the attachment proceedings through the service of process and from the recitals of the public record of Ouray county. It knew of the judgments thereafter rendered, and settled that of Golden before the prorating order of the court was made. (Transcript, page 74.) The Colorado statutes gave it a year from the entry thereof to vacate the judgments and file its answers to the merits of the actions, but it neglected to avail itself of the privilege. It had the right of redemption from the execution sales for six months thereafter, but permitted the time to lapse without action. It declined to defend the suit for confirmation of title subse-

quently brought by Mr. Walsh, the sheriff's grantee, and a stranger to the attachment suits, and permitted default and decree to be entered against it. More than four years afterward, during which time defendant enjoyed peaceable possession of the mines, expended money on their development, and paid the taxes assessed against them, plaintiff brings this action in ejectment for their recovery, denies the jurisdiction of state courts over its person or its property, repudiates their judgments and decrees, invokes the protection of the fourteenth amendment, and demands the recognition of its title and right of possession to our property. To grant its prayer for relief would be to nullify the solemn adjudications of our courts of record and their lawful execution, to overturn the established doctrines of this tribunal, to deprive defendant of his property acquired by purchase in good faith under process of law, and to unsettle titles to real property throughout the land. The defendant submits the case with confidence in the integrity of his rights, and in full reliance upon the protection of the laws as heretofore expounded and enforced by this Honorable court.

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APPENDIX.

The subjoined extracts from the Constitution, Annotated Statutes and Code of Procedure of the State of Colorado are believed to embrace all of our written laws relating to the controversy, and are hereto appended for the convenience of the court.

CONSTITUTION OF COLORADO—ARTICLE VI.

395. "COURT OF RECORD — JURISDICTION—LIMIT.) Section 23. County Courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlement of estates of deceased persons, appointment of guardians, conservators and administrators, and settlement of their accounts, and such other civil and criminal jurisdiction as may be conferred by law; Provided, such courts shall not have jurisdiction in any case where the debt, damage, or claim, or value of property involved, shall exceed two thousand dollars, except in cases relating to the estates of deceased persons.

APPEALS — WRITS OF ERROR.) Appeals may be taken from County to District Courts, or to the Supreme Court, in such cases and in such manner as may be prescribed by law. Writs of error shall lie from the Supreme Court to every final judgment of the County Court. No appeal shall lie to the District Court from any judgment given upon an appeal from a justice of the peace."

500. "FOREIGN CORPORATIONS—PLACE —AGENT.) Section 10. No foreign corporation

shall do any business in this state without having one or more known places of business and an authorized agent or agents in the same, upon whom process may be served."

MILLS' ANNOTATED STATUTES.

6. Foreign Corporations.

499. "FOREIGN CORPORATION—RECORD—LIABILITY—REAL ESTATE—MORTGAGE.) Foreign corporations shall, before they are authorized or permitted to do any business in this state, make and file a certificate signed by the president and secretary of such corporation, duly acknowledged with the secretary of state, and in the office of the recorder of deeds of the county in which such business is carried on, designating the principal place where the business of such corporation shall be carried on in this state, and an authorized agent or agents in this state, residing at its principal place of business, upon whom process may be served; and such corporations shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character, organized under the general laws of this state, and shall have no other or greater powers. And no foreign or domestic corporation, established or maintained in any way for pecuniary profit of its stockholders or members, shall purchase or hold real estate in this state, except as provided for in this act; and no corporation doing business in this state, incorporated under the laws of any other state, shall be permitted to mortgage, pledge

or otherwise incumber its real or personal property situated in this state, to the injury or exclusion of any citizen, citizens or corporations of this state who are creditors of such foreign corporation, and no mortgage by any foreign corporation, except railroad and telegraph companies, given to secure any debt created in any other state, shall take effect as against any citizen or corporation of this state, until all its liabilities due to any person or corporation in this state, at the time of recording such mortgage, have been paid and extinguished."

500. "FOREIGN CORPORATIONS — FILE COPY OF CHARTER.) Every company incorporated under the laws of any foreign state or kingdom, or of any state or territory of the United States, beyond the limits of this state, and now or hereafter doing business within this state, shall file, in the office of the secretary of state, a copy of their charter of incorporation; or in case such company is incorporated by certificate under any general incorporation law, a copy of such certificate and of such general incorporation law duly certified and authenticated by the proper authority of such foreign state, kingdom or territory."

503. "MAY SUE AND BE SUED AS NATURAL PERSONS.) Suits may be instituted and prosecuted by and against any corporation formed or recognized (organized) under this act, in the same manner and in like cases as natural persons."

506. "IN SUITS, PROCESS HOW SERVED ON CORPORATION—WHERE SUIT BROUGHT.) In suits against any corporation, summons shall be served in that county where the principal office of the

corporation is kept or its principal business carried on, by delivering a copy to the president thereof, if he may be found in said county, but if he is absent therefrom, then the summons shall be served in like manner in such county, on either the vice-president, secretary, treasurer, cashier, general agent, general superintendent or stockholder of said corporation, within such time and under such rules as are provided by law for the service of such process in suits against real persons, and if no such person can be found in the county where the principal office of the corporation is kept, or in the county where its principal business is carried on, to serve such process upon, a summons may issue from either one of such counties, directed to the sheriff of any county in this state where any such person may be found, and served with process. If such corporation keeps no principal office in any county, and there is no county in which the principal business of such corporation is carried on, then suit may be brought against it in any county where the above-mentioned officers, or any or either of them, may be found. Provided, That the plaintiff may, in all cases, bring his action in the county where the cause of action accrued."

DIVISION III, COUNTY COURTS.

1. Civil Business.

1054. JURISDICTION. $2,000. Estates Excepted.) The County Courts of the several counties of this state shall hereafter have concurrent jurisdiction with the District Courts in all civil actions, suits

and proceedings whatsoever, where the debt, damage or claim, or the value of the property involved, shall not exceed two thousand (2,000) dollars, except as otherwise provided in this act; Provided, however, That the limit of jurisdiction above named shall not apply in causes relating to the estates of deceased persons.

MILLS' ANNOTATED CODE.

25. "PLACE OF TRIAL OF CIVIL ACTIONS.

Except when otherwise provided, actions for the following causes shall be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial as provided in this act.

RECOVERY OF REAL PROPERTY.

First—For the recovery of real property, or of any interest therein, or for the determination of any form of such right or interest, and for injuries to real property.

PARTITION.

Second—For the partition of real property.

FORECLOSURE.

Third—For the foreclosure of a mortgage of real property; Provided, That where such real property is situated partly in one county and partly in another, the plaintiff shall bring his action in the county where the greater portion of such real estate is situate, and

the county so selected shall be the proper county for the trial of any or all such actions as are mentioned in this section."

26. "ACTIONS FOR STATUTORY PENALTY AND AGAINST PUBLIC OFFICERS—WHERE TO BE TRIED—POWER OF COURT TO CHANGE VENUE.

Actions for the following causes shall be tried in the county where the cause, or some part thereof, arose, subject to the like power of the court to change the place of trial:

First—For the recovery of a penalty of forfeiture imposed by statute, except that when it is imposed for an offense committed on a lake, river or other stream of water situated in two or more counties, the action may be brought in any county bordering on such lake, river or stream, and opposite to the place where the offense was committed.

Second—Against a public officer or person especially appointed to execute his duties, for an act done by him in virtue of his office, or against a person who, by his command, or in his aid, does anything touching the duties of such officer, or for a failure to perform any act or duty which he is by law required to perform."

27. "OTHER ACTIONS—WHERE TRIED—NON-RESIDENTS—DEPARTING FROM THE STATE—CONTRACTS—TORTS.

In all other cases the actions shall be tried in the county in which the defendants, or any of them, may reside at the commencement of the action, or in the

county where the plaintiff resides when service is made on the defendant in such county; or, if the defendant be a non-resident of this state, the same may be tried in any county in which the defendant may be found in this state, or in the county designated in the complaint, and if any defendant or defendants are about to depart from the state, such action may be tried in any county where plaintiff resides, or where defendant may be found and service had. Actions on book accounts or for goods sold and delivered, may be tried in the county where the plaintiff resides, or in the county where the goods were sold. Actions upon contracts may be tried in the county in which the contract was to be performed; actions upon notes or bills of exchange, in the county where the same are made payable; and actions for torts, in the county where the tort was committed, subject, however, to the power of the court to change the place of trial as provided in this act."

29. "CHANGE OF VENUE—CAUSES.

The court may, on good cause shown, change the place of trial in the following cases:

First—When the county designated in the complaint is not the proper county.

Second—When there is reason to believe that an impartial trial can not be had therein.

Third—When the conveniences of witnesses and the ends of justice would be promoted by the change.

Fourth—When from any cause the judge is disqualified to try the action; Provided, The court shall not change the place of trial for the disqualification of the district judge in any case where a competent

judge of another District Court will appear and try the action, or where the parties to the action agree upon an attorney to preside at the trial of such action."

32. "ACTIONS—HOW COMMENCED—SUMMONS—COMPLAINT—DISMISSAL WITHOUT NOTICE—ATTORNEY'S FEE.

Civil actions shall be commenced by the filing of a complaint with the clerk of the court in which the action is brought, or by the service of a summons.

The complaint must be filed within ten days after the summons is issued, or the action may be dismissed without notice, and in such case the court may, in its discretion, if it shall be of the opinion that the action was vexatiously commenced, tax a reasonable attorney's fee as costs in favor of the defendant, to be recovered of plaintiff or his attorney."

33. "SUMMONS WITHIN MONTH—HOW SIGNED, SEALED, DIRECTED.

The clerk shall endorse on the complaint the day, month and year the same is filed, and at any time within one month after the filing of the same, the plaintiff may have a summons issued. The summons may be signed by the clerk and directed to the defendant, to be issued under the seal of the court, or it may be signed and issued by the attorney for the plaintiff."

34. "DEFENDANT TO APPEAR AND ANSWER IN 20 DAYS—30 DAYS—10 DAYS ADDITIONAL—STATE MONEY OR OTHER RELIEF DEMANDED—VOID ONLY WHEN MISLEADING—FORM OF SUMMONS SAME IN ALL CASES.

The summons shall state the parties to the action, the state, county and court in which it is brought, and require the defendant to appear and answer the complaint within twenty days after the service of the summons, if served in the county in which the action is brought; or if served out of such county, or by publication, within thirty days after the service of the summons, exclusive of the day of service, or that judgment by default will be taken against him according to the prayer of the complaint, and shall briefly state the sum of money or other relief demanded in the action; but the summons shall not be considered void or erroneous on account of an insufficient statement of the relief demanded, unless the same is manifestly misleading. If a copy of the complaint be not served with the summons, or if the service be made out of the state, ten days additional to the time specified in the summons shall be allowed for appearance and answer, but the form of the summons shall be the same in all cases."

35. "FORM OF SUMMONS WITH COMPLAINT—SAME TO BE VARIED WHEN.

The summons, where a copy of the complaint is served therewith, may be in substance as follows, appropriately filling the several blanks, viz.:

State of Colorado,

ss.

———— County,

In the ———— Court.

————————, Plaintiff,

vs. Summons.

————————, Defendant.

The People of the State of Colorado.

To the defendant above named, Greeting:

You are hereby required to appear in an action brought against you by the above named plaintiff, in the ———— Court of ———————— county, state of Colorado, and answer the complaint therein within twenty days after the service hereof, if served within this county, or if served out of this county, or by publication, within forty days after the service hereof, exclusive of the day of service; or judgment by default will be taken against you according to the prayer of the complaint.

Given under my hand ———————— this ———— day of ————, A. D. ————.

————————————.

Where a copy of the complaint is not served with the summons, or service is had by publication, the above form shall be varied to meet the requirements of the case, as provided for in the preceding section."

37. "SUMMONS—BY WHOM SERVED—RETURN.

The summons shall be served by the sheriff of the county where the defendant is found, or by his deputy,

or by any person not a party to the action. When the summons is served by the sheriff, or his deputy, it shall be returned, with the certificate of the officer of its service, to the clerk or attorney who issued the same. When the summons is served by any other person, it shall be returned as before provided, with the affidavit of such person of its service."

38. "SUMMONS—HOW SERVED.

A summons shall be served as follows:

First—By delivering a copy thereof to each defendant named therein; or,

Second—By leaving a copy of the writ at the usual place of abode of each defendant named therein, with some member of the family in which he resides, who is over the age of fifteen years; or,

Third—At the usual place of business of the defendant, to be served (if he have one) with his clerk or bookkeeper thereat.

MUNICIPAL CORPORATION.

Fourth—If the action be against a municipal corporation, by delivering a copy of the summons to the mayor or clerk of such corporation.

COUNTY.

Fifth—If the action be against the county, by delivering a copy of the summons to the county clerk of such county.

SCHOOL DISTRICT.

Sixth—If the action be against a school district, by delivering a copy of the summons to the clerk or one of the directors of such school district.

PRIVATE CORPORATION.

Seventh—If the action be against a private corporation, by delivering a copy of the summons to the president or other chief officer of such corporation, or to the secretary, treasurer, cashier or other general agent thereof; but if no such officer of the corporation can be found in the county in which the action is brought, then service may be made by delivering a copy of the summons to any stockholder of such corporation who may be found in such county.

RAILROAD COMPANY.

Eighth—If the action be against a railroad company, whether organized under the laws of this state or of any other state or territory, and whether the charter prescribes the manner or place of the service of process on such company, the summons may be served by delivering a copy thereof to the president or vice-president, or secretary, or treasurer, or cashier of such company; Provided, That if no such officer be found in the county in which the action is brought, service of summons may be made by delivering a copy thereof to any regular or acting ticket agent of such company, having his office in the county in which the action is brought.

FOREIGN CORPORATION OR JOINT STOCK COMPANY.

Ninth—If the action be against a foreign corporation or joint stock company or association, organized under the laws of another state or territory, and doing business within this state, the summons shall be served by delivering a copy to any agent of such cor-

poration, company or association found in the county in which the action is brought. If no such agent be found in such county, then by delivering a copy of the summons to any stockholder who may be found in such county.

MINOR.

Tenth—If suit be brought against a minor under the age of fifteen years, the summons shall be served by delivering a copy of the writ to him personally, also a copy to his or her father, mother or guardian; or, if there be none such in the state, then by delivering a copy to any person having care or control of such minor, or with whom he or she resides, or in whose service he or she is employed.

LUNATICS.

Eleventh—If the action be against a person judicially declared to be incapable of conducting his or her own affairs, and for whom a guadian has been appointed, under the provisions of chapter LXIX of General Statutes, entitled 'lunatics,' summons shall be served by delivering a copy of the writ to such guardian."

38a. "ACT LIBERALLY CONSTRUED—SUMMONS NOT QUASHED FOR TECHNICAL ERROR.

This act shall be liberally construed, and no service of summons shall be set aside or quashed for any technical error, defect or omission, either in the summons or in the service of the summons, which error, defect or omission does not affect some substan-

tial right of the defendant or defendants therewith served."

38b. "REPEAL—SAVING CLAUSE.

All acts or parts of acts inconsistent with the provisions of this act are hereby repealed; but nothing herein contained shall be held to repeal any provision of law, now in force, which authorizes or permits a summons to be served in any other county of the state, than that in which the action is brought."

39. "SUMMONS IN DIFFERENT COUNTIES—ALIAS—PLURIES.

When there are several defendants residing in different counties, a separate summons may be issued to each county, for the service of the defendants residing therein, an alias or pluries summons may be issued and served in like manner as the original at any time."

41. "SERVICE BY PUBLICATION—WHEN ALLOWED—PROCEDURE.

Service by publication shall be allowed only after summons issued and return thereon made, that the defendant, after diligent search, can not be found. After such return, not less than ten days after issue of summons, publication shall be made by order of the clerk of the proper court, but shall be made only in cases of attachment, foreclosure, claims and delivery, and other proceedings where specific property is to be affected, or the procedure is such as is known as a proceeding in rem. After return is made as aforesaid, the case being such as hereinbefore mentioned, the plaintiff or one of the plaintiffs may file,

in the office of the proper clerk, an affidavit stating that the defendant resides out of the state, or has departed from the state without intention of returning, or concealed himself to avoid the service of process and giving his postoffice address, if known, or stating his postoffice address is not known to affiant, whereupon the order of publication shall be made by the clerk. The order shall direct the publication to be made in a public newspaper published in the county. Such publication shall be made at least once a week for four successive weeks. When the affidavit gives the postoffice address of the defendant, the clerk shall mail a copy of the summons, duly stamped, to the defendant, at such address forthwith. The service shall be complete at the expiration of ten days from the date of the last publication. When no newspaper is published within the county, the clerk shall designate a newspaper published in some adjoining county; Provided, That if the plaintiff does not reside in the state or is absent from the state, the affidavit for service by publication may be made by the plaintiff's attorney in the action."

44. "WHEN COURT DEEMED TO ACQUIRE JURISDICTION — VOLUNTARY APPEARANCE —SERVICE UPON UNKNOWN PARTIES.

From the time of the filing of the complaint, or the service of the summons in a civil action, the court shall be deemed to have acquired jurisdiction, and to have control of all subsequent proceedings. A voluntary appearance of a defendant shall be equivalent to personal service of the summons upon him. If any plaintiff shall allege that there are, or that he

verily believes that there are, persons interested in the subject-matter of the complaint, whose names he can not insert therein, because they are unknown to him, and shall describe the interest of such persons, and how derived so far as his knowledge extends, the court, or the judge thereof in vacation, shall make an order as in case of non-residents for publication of the summons, reciting, moreover, the substance of the allegations of the complaint in relation to the interest of such unknown parties, and after the completion of service by such publication, the court shall have jurisdiction of such person, and any judgment or decree rendered in the action. The action shall apply to and conclude such persons with respect to such intent in the subject-matter of the action."

92. "AFFIDAVIT—CAUSES OF ATTACHMENT.

No writ of attachment shall issue unless the plaintiff, his agent or attorney, or some credible person for him, shall file in the office of the clerk of the court in which the action is brought, an affidavit setting forth that the defendant is indebted to such plaintiff, stating the nature and amount of such indebtedness as near as may be, and alleging any one or more of the following causes for attachment, viz.:

NON-RESIDENTS.

First—That the defendant is not a resident of this state.

FOREIGN CORPORATIONS.

Second—That the defendant is a foreign corporation.

OFFICE OUT OF STATE.

Third—That the defendant is a corporation whose chief office or place of business is out of the state.

DEFENDANT CONCEALS HIMSELF—ABSENCE.

Fourth—That the defendant conceals himself, or stands in defiance of an officer, so that the process of law can not be served upon him, or that the defendant has for more than four months been absent from the state, or that for such length of time his whereabouts have been unknown, and that the indebtedness mentioned in the affidavit has been due during all of said period.

REMOVAL OF GOODS.

Fifth—That the defendant is about to remove his property or effects, or material part thereof, out of this state, with intent to defraud, or hinder, or delay his creditors, or some one or more of them.

TRANSFERRING PROPERTY.

Sixth—That the defendant has fraudulently conveyed or transferred or assigned his property or effects, so as to hinder or delay his creditors, or some one or more of them.

CONCEALMENT, REMOVAL, DISPOSAL OF GOODS.

Seventh—That the defendant has fraudulently concealed or removed, or disposed of his property or effects, so as to hinder or delay his creditors, or some one or more of them.

ABOUT TO CONVEY OR ASSIGN.

Eighth—That the defendant is about to fraudulently convey, or transfer, or assign his property or effects, so as to hinder or delay his creditors, or some one or more of them.

ABOUT TO CONCEAL OR DISPOSE OF—ABOUT TO DEPART.

Ninth—That the defendant is about to fraudulently conceal, or remove, or dispose of his property or effects, so as to hinder or delay his creditors; or that such debtor has departed, or is about to depart from this state with the intention of having his effects removed from the state.

FAILURE TO PAY ON DELIVERY.

Tenth—That the defendant has failed or refused to pay the price or value of any article or thing delivered to him, which he should have paid for upon the delivery thereof.

FAILURE TO PAY FOR WORK OR SERVICES.

Eleventh—That the defendant has failed or refused to pay the price or value of any work or labor done or performed, or for any services rendered by the plaintiff at the instance of the defendant, and which should have been paid at the completion of such work, or when such services were fully rendered.

DEBT FRAUDULENTLY CONTRACTED—FALSE PRETENSES.

Twelfth—That the defendant fraudulently contracted the debt, or fraudulently incurred the liabil-

ity respecting which the suit is brought, or by false representations, or false pretenses, or by any fraudulent conduct, procured money or property of the plaintiff."

92e. "SUIT BEGUN IN COUNTY COURT—AMOUNT EXCEED TWO THOUSAND DOLLARS—TRANSFER PAPERS TO DISTRICT COURT—JOINT ISSUES—PROOF BEFORE JUDGMENT IS RENDERED.

Whenever the original suit in which a writ of attachment shall be issued and served, shall be begun in the County Court of any county in this state, and the claim of any intervenor or attaching creditor therein, as hereinbefore provided, shall exceed the sum of two thousand dollars, exclusive of costs, it shall be the duty of such court to forthwith certify such case and transmit all papers issued or filed therein, to the District Court of such county, and thereafter the case shall proceed in the same manner as if it had been originally begun in such District Court. In all cases in which issues shall be joined upon the several complaints or affidavits in attachment, separate trials shall be had unless otherwise ordered by the court; but in default of an issue therein, each creditor shall make proof of his claim to the satisfaction of the court before judgment shall be rendered therein."

97. "WRIT TO DIFFERENT COUNTIES—CONTENTS—ALIAS WRITS WHEN SHERIFF TO TAKE SECURITY.

The writ shall be directed to the sheriff of any county in which the property of such defendant may

be, and require him to serve a copy of the writ on the defendant and to attach and safely keep all the property of such defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which shall be stated in conformity with the affidavit, and alias writs may issue at any time, unless the defendant deposit the amount or give him security, by the undertaking of at least two sufficient sureties in an amount sufficient to satisfy such demand, besides costs, or in amount equal to the value of the property which has been or is about to be attached, in which case the sheriff shall take such undertaking. Several writs may be issued at the same time to the sheriffs of different counties."

104. "SHERIFF EXECUTE UNLESS DEFENDANT GIVE BOND.

The sheriff to whom the writ is directed and delivered shall execute the same without delay, and if the undertaking mentioned in this chapter be not given by the defendant, then as follows:

REAL PROPERTY—HOW ATTACHED.

First—Real property standing upon the records of the county in the name of the defendant shall be attached by filing a copy of the writ, together with a description of the property attached, with the recorder of the county.

PROPERTY HELD IN NAME OF OTHER PERSON.

Second—Real property, or any interest therein, belonging to the defendant and held by any person,

or standing upon the records of the county in the name of any other person (but belonging to the defendant), shall be attached by leaving with such person, or his agent, a copy of the writ and a notice that such real property (giving a description thereof), and any interest therein belonging to the defendant, are attached pursuant to such writ, and filing a copy of such writ and notice with the recorder of the county.

PERSONAL PROPERTY.

Third—Personal property capable of manual delivery shall be attached by taking it into custody."

108. "JUDGMENT TO BE SATISFIED OUT OF ATTACHED PROPERTY—EXECUTION FOR BALANCE—SALE AND NOTICE AS IN OTHER EXECUTION SALES.

If judgment be recovered by the plaintiff, the sheriff shall satisfy the same out of the property attached by him, which has not been delivered to the defendant or claimed as hereintofore provided, or subject to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose.

First—By paying to the plaintiff the proceeds of all sales of perishable property sold by him, or any debts or credits collected by him, or so much as shall be necessary to satisfy the judgment.

Second—If any balance remain due, and an execution shall have been issued on the judgment, he shall sell, under the execution, so much of the property, real or personal, as may be necessary to satisfy the balance, if enough for that purpose remain in his

hands. Notices of the sales shall be given, and the sales conducted as in other cases of sales on execution."

109. "BALANCE DUE WHEN GENERAL PERSONAL JUDGMENT—HOW COLLECTED—SURPLUS.

If, after selling all the property attached by him remaining in his hands, and applying the proceeds, together with the proceeds of any debts or credits collected by him, deducting his fees, to the payment of the judgment, and any balance shall remain due, the sheriff shall, if there be a general, personal judgment against the defendant, proceed to collect such balance as upon an execution in other cases. Whenever the judgment shall have been paid, the sheriff, upon reasonable demand, shall deliver over to the defendant the attached property remaining in his hands, and any proceeds of the property attached unapplied on the judgment."

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

No. 134.

COSMOPOLITAN MINING COMPANY,
PLAINTIFF IN ERROR,

vs.

THOMAS F. WALSH, DEFENDANT IN ERROR

Error to the Circuit Court of the United States for the District of Colorado.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR ON ISSUE OF JURISDICTION.

The original brief for the defendant (pages 94-104) discussed the question of jurisdiction under the sub-head, "Fourteenth Amendment." The application of that amendment to the record was distinctly challenged, and the pertinence of the authorities cited by plaintiff in support of its right to review the judgment in this court was denied. The action does not,

we maintain, fall within the purview of section 5 of the act of March 3, 1891. This contention, we believe, is fully supported by the language of the section, and by the logic of the decisions based upon it, and upon the succeeding sections of the statute.

When the plaintiff brought this action it invoked the jurisdiction of the United States Circuit Court solely on the diverse citizenship of the parties. The defendant was alleged to be a citizen of Colorado, and the plaintiff was a corporation and citizen of Maine. In his answer the defendant alleged title to the mines in dispute, through certain execution sales upon judgments in attachment suits, duly brought in the County Court of Ouray county, and by reason of a decree quieting his title as against the plaintiff in an action instituted by him under the statute in the District Court of Ouray county. The plaintiff replied, denying personal service in any of the actions pleaded, averred a conspiracy of bidders at the sheriff's sale, and attacked the regularity of that sale upon other grounds. No assertion of the construction or application of the Constitution was made.

Nine months afterward the plaintiff filed an amended replication whereby it alleged

> "that, by reason of the actions of the said County Court and the sheriff of Ouray county, Colorado, had and done in, and in pursuance of, said several actions and by defendant in said defense particularly mentioned and described, the plaintiff has been, and is being, deprived of its property, viz.: the property sought to be recovered in this action, without notice, hearing, opportunity

> to be heard or due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States." (Printed Record, page 14.)

When the defendant offered the records of the several judgments pleaded in his answers, the plaintiff, among others, made the objection that, to give effect to them, would be to deprive it of the property in controversy without due process of law, and in contravention of the Constitution. (Transcript, pages 53, 91.)

On August 15, 1901, the trial judge signed a certificate which was incorporated into the record which was entitled of the court and cause, reciting that,

> "I, John A. Marshall, United States district judge for the district of Utah, assigned to hold the Circuit Court of the United States for the district of Colorado, before whom the above entitled action was tried, do hereby certify that, in the pleadings in this action, as well as in the rulings of this court in admitting and refusing to admit evidence, and in giving, and refusing to give, instructions to the jury as set forth in the assignment of errors hereto annexed, there were involved the application and construction of the Constitution of the United States, viz.: of that part of the Fourteenth Amendment to the same which provides for due process of law." (Transcript, page 19.)

These recitals indicate the manner in which the application of the federal Constitution is claimed to be involved in the record.

The certificate made by Judge Marshall, who presided at the trial of the case in the Circuit Court, as set forth in the record, does not and can not establish or support the claim of the plaintiff in error, that this court has jurisdiction of the question, or should review the decision of the Circuit Court:

(a) This case is not one of those in which a certificate is authorized or permitted by the act of March 3, 1891.

The attention of the court has been hitherto directed to the fact that no warrant can be found in the act of 1891 for Judge Marshall's certificate of August 15th. When an appeal is taken under section 5 of that act on the question of jurisdiction of the Circuit Court, that question alone shall be certified for decision to this court from the court below. The certificate in question does not relate to jurisdiction. It could not well do so, since the jurisdiction of the cause by the Circuit Court was not questioned. The certificate does not undertake to present any question or questions of law to this court, concerning which any instruction is desired. If it did, it would be worthless, as the right to do so is bestowed by section 6 of the act upon the Circuit Courts of Appeals alone.

(b) The certificate of Judge Marshall can not establish the existence of such a controversy or state of contention, as would permit the case to be taken for review direct to this court, even if it were one of the class of cases which may be brought to this court upon the record disclosing the necessary questions for that purpose.

In no case, save that in which, as above stated, the certificate of the judge of the Circuit Court authorizes the bringing of the case to this court for review, is the certificate of the court of any effect for that purpose.

The certificate can impart nothing to the record which is not already there. On the other hand, that which the record discloses can neither be limited nor enlarged by the statement of the trial judge. Were the rule otherwise, the recitals of a record might be contradicted by a judicial certificate and jurisdiction given or denied to this court or the Circuit Court of Appeals, as the opinion of the trial judge might determine. Analogous to this certificate are those which, under the judiciary act bringing certain judgments of state courts of last resort under the review of this court, are sometimes attached by the state justices to the transcripts of the records of such judgments. In Lawler vs. Walker, 14 Howard, 149, this court, referring to such a certificate, said:

> "The conflict of a state law with the Constitution of the United States, and a decision by a state court in favor of its validity, must appear on the face of the record before it can be re-examined in this court. * * * This certificate is that the Supreme Court of Ohio held that certain statutes of Ohio were valid, which had been alleged to be in violation of the Constitution of the United States, without naming what those statutes were. This is neither within the letter nor spirit of the act. If permitted, it would make the state courts judges of the

> jurisdiction of this court, and might cause them to take jurisdiction in cases in which conflicts between the state laws and the Constitution and the laws of the United States did not exist."

In Parmelee vs. Lawrence, 11 Wall., 38, it was said that:

> "If this court should entertain jurisdiction upon a certificate alone, in the absence of any evidence of the question of the record, then the Supreme Court of the state can give jurisdiction in every case when the question is made by counsel in argument."
>
> "We have repeatedly held that such certificate is insufficient to give us jurisdiction when it does not appear in the record."
>
> Yazoo Company vs. Adams, 180 U. S., 48.

The certificate of Judge Marshall at most could only affirm something disclosed by the record. It could add nothing to its efficacy for jurisdictional purposes.

From the record, therefore, the right to this writ must be derived. Does it present a case directly reviewable by this court? This, as we are advised, is the sole proposition upon which further discussion is desired.

Warrant for the writ of error herein must be found in section 5, 26 U. S. Statutes, 827, as amended, 29 U. S. Statutes, 495, which, for convenience, is here quoted in full:

> "That appeals or writs of error may be taken from the District Courts, or from the existing Circuit Courts, direct to the Supreme Court in the following cases: In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision. From the final sentences and decrees in prize causes. In cases of conviction of a capital crime. *In any case that involves the construction or application of the Constitution of the United States.* In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question. *In any case in which the Constitution or law of a state is claimed to be in contravention of the Constitution of the United States.*"

It is obvious that the plantiff's right to the writ of error from this court must be founded upon that clause of the above section which refers to the construction or application of the Constitution of the United States. Counsel do not pretend to find warrant for it elsewhere They say, page 14, that the case

> "was brought here under that clause of section 5, 26 U. S. Statutes, 828, which provides that where the construction or application of the federal Constitution is involved an appeal or writ of error may be taken to this court from the Circuit Courts. We submit

> that the application of a portion of the Fourteenth Amendment to the Constitution of the United States, which provides that no person shall be deprived of his property without due process of law, is involved in the case at bar, and that the determination of this question was necessary to a decision of the case in the court below, and is necessary here."

On the next page of their brief the court is informed that

> "the judgments of the County Court of Ouray county are attacked solely upon the ground that they were rendered without due process of law, inasmuch as the court never obtained jurisdiction of the plaintiff in error."

We begin the discussion, therefore, without dispute as to the basis or character of the question.

If the "process of law" clause of the Fourteenth Amendment is involved herein, either by way of construction or application, it is because plaintiff has so averred in its amended replication. There is nothing in the offer, admission or rejection of evidence, that in any manner involves this. The attack upon the judgments of the County Court of Ouray county, as being without due process of law, is grounded solely upon the contention that the court never obtained jurisdiction *of the person of the plaintiff in error.* The attack upon the decree quieting defendant's title is the same. Yet it can not be successfully contended that such jurisdiction is at all necessary

to the regularity of these proceedings if the court had jurisdiction *of the property in controversy*, in harmony with the statutes of the state, making due provision therefor. In other words, *the absence of due process whereby jurisdiction of the person is not secured is of no importance, and therefore, can not be involved in the case, if by due process, jurisdiction of the thing has been secured, and the ensuing judgment has been enforced as to the thing alone.*

Plaintiff also (page 15) admits that the Circuit Court acquired jurisdiction by reason of the diverse citizenship of the parties. It attempts to excuse the absence of the "constitutional question" from the complaint, because it could not know that the defendant in error would rely upon the judgment and the proceedings that present the question. The excuse is absurd.

The records of both the courts and of the recorder of the county were available to the plaintiff. It was by the statute bound to take notice of the latter. The transcript shows that the attachments, the liens, the certificates of sale and the sheriff's deed under the attachment judgments were all recorded, and formed the sole and only basis of the defendant's title to the premises in question. The plaintiff knew this just as well when it began the action as it did nine months after filing its original replication, when it filed its last and amended one. To claim that it could not have alleged the existence of its constitutional question in the body of its complaint because it could not know what the defendant's answer and defense would be, is under all the circumstances to presume most unduly upon the assumed credulity of this court.

The attempted intrusion of the question by an amended pleading months after the case was ready for trial, would indicate that it had not occurred to counsel when the case was brought, nor until after the issues were duly framed, and had no real existence in the case.

The application or construction of some part of the federal Constitution must be in fact involved in a case which comes to this court under section 5 of the act of 1891, and that fact must appear in some other manner than by the mere assertion of a claim. It has been many times decided by this court that the bare averment of a federal question will not give the court jurisdiction.

New Orleans vs. New Orleans Co., 142 U. S., 79.

Millinger vs. Hartupee, 6 Wall., 258.

Hamblin vs. The Western Land Co., 147 U. S., 531.

St. Louis R. W. Co. vs. Missouri, 156 U. S., 483.

Wilson vs. North Carolina, 169 U. S., 595.

Clarke vs. McDade, 165 U. S., 172.

St. Paul R. W. Co. vs. St. Paul Co., 68 Fed., 11; 32 U. S. App., 372.

Northern Pacific Co. vs. Musser Co., 168 U. S., 607.

Brown vs. Colorado, 106 U. S., 95.

Leiper vs. Texas, 139 U. S., 462.

Tuppe vs. R. R. Co., 147 U. S., 126.

"The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor the validity of an authority every time an act done by such authority is disputed."

Cook County vs. Calumet Co., 138 U. S., 635.

Blackburn vs. Portland Co., 175 U. S., 586.

A general statement that the decision of a court is against the constitutional rights of the objecting party or the Fourteenth Amendment, or that it is without due process of law, particularly when these specifications appear only in specifications of error, so called, will not raise a federal question, even where the judgment is a final one, within the section of the Revised Statutes above mentioned. There must be at least some part of a federal question.

Clarke vs. McDade, 165 U. S., 172.

Beals vs. Cone, 188 U. S., 184.

The cases cited were on writs of error to state courts, and, of course, under an entirely different statute, but the general principle covered by them is fully as applicable to cases like the one at bar. Decisions of similar import, arising under sections 5 and 6 of the act of 1891, are in harmony with the proposition that the element conferring jurisdiction must be actual, and not colorable merely.

In World's Columbian Exposition vs. United States, 56 Fed., 654, the appellee moved to dismiss the appeal because the jurisdiction of the court was in

issue, that the case involved a construction and application of the Constitution of the United States, and that the constitutionality of federal laws was drawn in question; hence the appeal to the Circuit Court of Appeals from an interlocutory order could not be maintained under section 7 of the act.

Chief Justice Fuller, in denying the motion, said:

> "We do not understand that the power of the Circuit Court to herein determine the cause was denied, but that appellants contended that the United States had not by their bill made a case properly cognizable in a court of equity. The objection was want of equity, and not want of power. The jurisdiction of the Circuit Court was, therefore, not in issue within the intent and meaning of the act. So far as the construction or application of the Constitution of the United States and the constitutionality of the laws of the United States are concerned, we are of the opinion that the case involved, or there was drawn in question, neither the one nor the other, in the sense that the action of the Circuit Court was invoked to dispose of or proceeded upon the disposition of the contention raised as to either. The ground of the decision had no reference to the construction or application of the Constitution, or the validity of the acts of Congress in respect to that instrument, and the conclusions upon which the order was entered were unaffected by considerations of that character. Cases in

which the construction or application of the Constitution is involved, or the constitutionality of any law of the United States is drawn in question, are cases which present an issue, upon such construction, or application, or constitutionality, the decision of which is controlling; otherwise every case arising under the laws of the United States might be said to involve the construction or application of the Constitution, or the validity of such laws. The jurisdiction of this court to review the order can not be defeated at the instance of appellees, because the constitutionality of the acts upon which they rely might have been challenged by their adversaries."

This decision is in accord with those which determine that when the jurisdiction of a Circuit Court of the United States is invoked, solely on the ground of diverse citizenship, the ground thus invoked is controlling, whether questions of a federal character may present themselves in the progress of the case. In Colorado Central Co. vs. Turck, 150 U. S., 138, a writ of error was sued out from this court to the Circuit Court of Appeals for the Eighth circuit. The case was originally brought in the circuit for the district of Colorado, on the ground of diverse citizenship. It was contended, nevertheless, that the vital issue of the controversy depended upon the construction and application of section 2322, R. S., concerning the apex or dip of lodes or veins, that jurisdiction existed on that ground and did not depend entirely upon that of citizenship. Also, that on the question

of jurisdiction, reference might be had to the entire pleadings, the evidence, or the rulings of the courts below. But the court said that

> "this view ignores the settled doctrine that the inquiry in cases such as this into the jurisdiction of the Circuit Court is limited to the facts appearing in the record in the first instance."

The decision in Metcalf vs. Watertown, 128 U. S., 586, is cited with approval, following which the chief justice says:

> "The jurisdiction of the Circuit Court was invoked December 2, 1885, by the filing of the complaint, from which it appeared that the suit was one of which cognizance could be properly taken on the ground of diverse citizenship, but it did not appear therefrom that jurisdiction was vested or could be asserted on any other ground. The federal question now suggested did not emerge until the defendant set up its second defense, and not then unless deducible from the bare averment that it claimed under the senior discovery and patent, which was admitted in the replication. * * * The jurisdiction had, however, already attached, and could not be affected by the subsequent developments. It depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred. If the

> plaintiff had invoked it on two distinct grounds, one of them being independent of diverse citizenship, a different question might have been presented."

In that case, the alleged federal question was invoked by the defendant, which could not have asserted it prior to the filing of the answer, when it was too late to do so. In the case at bar, the alleged federal question was known or could have been known to the plaintiff before and at the time the complaint was filed. It could have included that with diverse citizenship as an element of jurisdiction, but failed to do so. It did not emerge until the amended replication was tardily filed, and then only as a legal conclusion. The fact that the case cited was error to the Court of Appeals, while the one at bar is error direct to the trial court, should not affect the general proposition.

Borgmeyer vs. Idler, 159 U. S., 408.
Ansbro vs. United States, 159 U. S., 698.
Ex parte Jones, 164 U. S., 691.
Wise vs. Nixon, 78 Fed., 204.
Blackburn vs. Portland G. M. Co., 175 U. S., 570.

The doctrine of these and other authorities bearing on the same subject justify the contention that, although the construction of a federal statute or the application or construction of the Constitution of the United States should be involved in the trial of a cause, or should emerge from the pleadings or otherwise, after its commencement, yet unless the existence

of such question be alleged at the outset as one of the grounds of jurisdiction, the case must go to the Circuit Court of Appeals for review, and the decision of that court is final. It can not, under the act of 1891, come to this court either by writ of error to the trial court, or to the Circuit Court of Appeals.

But we are not obliged to rest our contention upon this point.

The record does not make it appear that the Fourteenth Amendment, its construction or application, was involved in the trial of the case, or was the basis of any right or contention by the plaintiff, or that it was claimed or asserted below that the state had done any of the things prohibited by the Fourteenth Amendment. The record fails to disclose that such question was presented, discussed or decided, and much less that it was a substantial, colorable or controlling consideration in the determination of the issues in the case. We have shown, by the decisions of this court, and the plain language of the act of March 3, 1891, that Judge Marshall's certificate was insufficient, and the allegations contained in the amendment to the replication were wholly futile and unavailing, to create, present or preserve for the consideration of this court, a controversy under the Fourteenth Amendment, which would enable this court for that reason to review the decision of the court below. Such question must *bona fide* exist in the case, and not be there merely formally or by naked assertion or allegation. The state of Colorado passed no law which the plaintiff claimed deprived it of its property without due process of law. If the state court found, as a matter of fact, that an authorized agent was served, this could not be construed to bring the case

within the inhibitions of the Fourteenth Amendment, or to raise a colorable discussion as to the applicability of the amendment thereto. Simply because the plaintiff alleges that it was deprived of its property without due process of law, is wholly unavailing for the purpose of conferring jurisdiction to review upon this court. There is wanting an essential element—a state statute or law authorizing this wrong to be perpetrated, and under the authority of which the wrong in fact, it is claimed, has been accomplished. The complaint, which alleged, as the ground of jurisdiction in the Circuit Court, diverse citizenship of the litigants, did not hint at the existence of such a controversy, or that plaintiff claimed that any statute or law of the state of Colorado had deprived it or had authorized it to be deprived of its property without due process of law. Nor did the complaint state any facts logically indicating the existence of such a claim, or from which it could be by the most strained inference remotely deduced. When the amendment to the replication was filed, it made no allegation showing in fact the existence of such a claim on plaintiff's part, but presented only a bald, unsupported statement, that the Fourteenth Amendment had been sinned against. This condition of the record is, under repeated decisions of this court, utterly insufficient to import such a question into it or the case, or to authorize the case to be brought upon writ of error to this court for review. Mere assertion, anywhere in the record, would be futile to confer jurisdiction. The Fourteenth Amendment is expressly directed against the state, and not against individuals; against the injustice, for which the law makes provision, not

against the misapplication or misinterpretation of the law by the courts or its violation by individuals.

Kiernan vs. Multnomah Co., 95 Fed., 849.
In re Ah Lee, 5 Fed., 899.

No tenable or plausible contention against the statute in Colorado has been or can be presented. No claim can be colorably made that it violated the Constitution of the United States. No decision by the trial court was had so indicating. The record does not present or touch upon such questions, and the case was therefore not within the class reviewable here, contains no justification for being brought here, and, we submit, may not be entertained by this court. If a mere assertion in a pleading or brief, or at the trial, would compel this court to take jurisdiction, then the existence or non-existence of its jurisdiction would depend upon and be determined, not by the Circuit Court, which we have shown herein, by decisions of this court, could not be done, but by the litigant or his counsel, who would be enabled, by a mere assertion in the pleading, made in good or bad faith, plausible or without color or excuse, wholly without support in fact, to secure audience here, and in effect repeal the statutes which have sought to afford this court relief from the ever-increasing flood of appeals and writs of error which poured in upon it.

We assert that neither the application nor the construction of the Fourteenth Amendment is in any manner involved in the cause, and, as above urged, that the assertion of the pleader to that effect can not import the question into the record. Were it otherwise, in addition to grounds against this claim above

presented, "every case," in the language of the chief justice,

> "arising under the laws of the United States, might be said to involve the construction or application of the Constitution or the validity of such laws."

It is a principle of pleading, much older than the act of 1891, that any averment which is a legal conclusion can not operate to the prejudice of anyone, unless the conclusion be well founded, and this is especially true when jurisdiction is sought to be thereby sustained.

> New Jersey R. R. Co. vs. Mills, 113 U. S., 257.
>
> Metcalf vs. Watertown, 128 U. S., 536.

> "The only reference to the Constitution or laws of the United States is the suggestion that the defendants will contend that the law of the state under which the plaintiffs claim is void, because in contravention of the Constitution of the United States; and by the settled law of this court, as appears from the decisions above cited, a suggestion from one party that the other will or may set up a claim under the Constitution or laws of the United States does not make the suit one arising under that Constitution or those laws."
>
> Tennessee vs. Union Bank, 152 U. S., 454.

This is but saying, in effect, that, in order to make a case one arising under the Constitution or laws of the United States, an issue must be directly presented, involving such construction, which issue must of itself be conclusive of the case.

Gold Washing Co. vs. Keyes, 96 U. S., 199.

Railroad Co. vs. Amato, 144 U. S., 465.

Western Union Co. vs. Railroad Co., 178 U. S., 239.

Chapin vs. Frye, 179 U. S., 127.

In Ansbro vs. U. S., 159 U. S., 695, it was said that a case involved the construction or application of the federal Constitution when a right, title, privilege or immunity is claimed under that instrument, but a definite issue in respect to the possession of the right must be distinctly deducible from the record, before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. This principle was enforced in

Cornell vs. Green, 163 U. S., 75;

Muse vs. Arlington Hotel Co., 168 U. S., 430,

both being on error direct to the trial court.

Western Union Co. vs. Ann Arbor Co., 178 U. S., 239, originally brought in the state court, was removed to the Circuit Court of the United States by the defendant on an averment that the suit arose under the Constitution and laws of the United States. Whether it did so arise depended, said the court, on complainant's own statement of the case. It did not there so appear, and the jurisdiction of the Circuit

Court was denied, although there was a diversity of citizenship, whereby the plaintiff might have originally brought its suit there.

Arkansas vs. Schlierholz, 179 U. S., 598.

The principle of these cases, when applied to the record before the court, reveals the fact that the claim of construction or application of the Fourteenth Amendment to the rights asserted by the plaintiff is not even colorable. As stated in the amended replication, and in the objections interposed to the defendant's offer of proof, it complained that it was deprived of its property without notice, hearing, or opportunity to be heard, or due process of law, and in violation of the Fourteenth Amendment. This allegation was, it must be assumed, aimed at the judgments of the state courts forming the basis of our title as judgments in personam.

There were involved, and are now, involved in this case, only questions of general law and of fact, and these do not authorize the case in which they are presented to be brought to this court for review.

We think it can be safely asserted that a case is not presented involving a construction of the Constitution of the United States when in the trial of a cause in the Circuit Court, a prior judgment of a state court, or of another federal court, is offered in evidence, and is objected to on the ground that the court which rendered the first judgment did not have jurisdiction to render the same because the question of the validity of the original judgment is one of general law. It is only in the case itself that the applica-

tion or construction of the Constitution or of the federal laws can be involved.

Chouteau vs. Gibson, 111 U. S., 205.

California vs. Holiday, 159 U. S., 415.

Spencer vs. Duplau Co., 24 S. C. Reporter, 174.

Defiance Water Co. vs. Defiance, 24 S. C. Reporter, 63.

San Francisco vs. Itsell, 133 U. S., 65.

Anglo-American Co. vs. Davis Co., 24 S. C. Reporter, 93.

In Carey vs. Houston Railway Co., 150 U. S., 170, 181, the court says:

> "It is argued that the record shows that complainants had been deprived of their property without due process of law, by means of a decree attached, but because the bill alleged irregularities, errors and jurisdictional defects in the foreclosure proceedings and fraud in respect thereof, and in the subsequent transactions which might have enabled the Railroad Company upon a direct appeal to have avoided the decree of sale, or which, if sustained on this bill, might have justified the Circuit Court in setting aside that decree, it does not follow that the construction or application of the Constitution was involved in the sense of the statute."

See, also:

Carey vs. Houston Co., 161 U. S., 115.
Iowa vs. Rood, 187 U. S., 87.
Hooker vs. Los Angeles, 188 U. S., 314.

The plaintiff's attack upon the Ouray County and District Court's judgments are merely that they were void for want of jurisdiction of the person, and, that being a proposition of general jurisprudence, does not involve the application or construction of the federal Constitution. If it were otherwise, counsel might insert an appropriate allegation into the pleadings in every conceivable case, and by that means invest this court with general jurisdiction of all controversies.

The questions of law and fact which control in this case, and must determine the decision thereof, are in no sense federal in their nature or their origin, much less are they, even incidentally, concerned with the Fourteenth Amendment to the Constitution of the United States, or present the frailest support for invoking its protection. After the fullest and most searching investigation of the case and the record, it must be decided upon these questions of law and fact, without a reference or allusion to the application of any provision of the Constitution of the United States, or of any federal statute. Hence, this court is without jurisdiction to consider the case upon its merits or to go further than to find that the writ should not have been brought to this court, and for that reason to dismiss it.

The record may be summarized, and the questions of law and fact involved in the case, and the decisions of this court which are controlling and decisive with

reference thereto as to the judgments and sales thereunder in controversy herein, may be briefly presented as follows:

The plaintiff was organized as a corporation under the laws of Maine, for the purpose of acquiring, owning, holding and operating mining property in the state of Colorado. It came to Colorado, where it found in existence a statute requiring a foreign corporation, before it was authorized to do business in this state, to file its articles of incorporation with the secretary of state and with the clerk and recorder of the county in which its chief office would be, to designate its principal place of business, and to appoint an authorized agent upon whom service of process could be had, which appointment or authorization should be filed with the secretary of state and the clerk and recorder of the county in which it designated its principal office to be located. This was done. The articles were filed, as required, and the agent, Mr. Jardine, designated. No designation of the period for which he should be the agent of the company was made. He was never removed from his position, but changed his residence, giving the utmost force to the contention of the plaintiff, from Ouray, in Ouray county, to Telluride, in San Miguel county, where he was nearer to the mines than at Ouray. The plaintiff had conveyed to it the property here in question, situated in Ouray county, and continued in the ownership from that time until divested thereof by the judgments and sales thereunder under consideration in this case. While thus owning and operating these properties, it became indebted to the several plaintiffs in the actions in the County Court, all of whom were citizens and residents

of the state of Colorado, doing business in Ouray county, and all furnished supplies for or did work upon the property here in controversy. While thus indebted to the several plaintiffs in these actions, and retaining the property it had acquired, with its authorized agent unremoved, still residing within the state, it was sued in attachment by the several plaintiffs, the property herein levied upon, process served upon Mr. Jardine, judgments based thereon regularly entered, sale had of the property, conveyance thereof made, and by mesne conveyances it passed to the defendant.

The following references to the transcript will sustain this view:

Cosmopolitan Co. Organized June 26, 1884. (Foreign Corporation, page 27, folio 55.)

Appointed Jardine process agent, "in compliance with requirements laws of Colorado," December 16, 1885. (Page 32, folio 64.)

Ashenfelter vs. Company. Attachment, Ouray County Court. Suit begun May 21, 1895. For work done between June 1 and December 1, 1894. (Page 59, folio 107.)

Bond in attachment, signed by plaintiff as resident of Ouray county. (Page 59, folio 108.)

Begole Company vs. Cosmopolitan Company. Attachment, County Court, April 26, 1895. Plaintiff corporation under laws of Colorado. Also assignee of San Juan Hardware Company's account, said company being Colorado corporation. (Page 66, folio 118.)

Action for goods sold to defendant between May 8 and July 24, 1894.

P. H. Fennell vs. Cosmopolitan Company. Action begun May 23, 1895, to recover for work done by

himself and one Dowd for the defendant, at its request, prior to August, 1894. (Page 76, folio 131.)

Fulton vs. Cosmopolitan Company. Commenced May 23, 1895, for work done for defendant by John Lillar prior to November 4, 1893. Claim assigned to plaintiff; signs bond as resident of Colorado. (Pages 85-6, folios 144-7.)

Summons served on Jardine as agent, May 7th, May 23d, May 27th and June 23d, respectively. (Page 61, folio 110; page 69, folio 12; page 79, folio 136; page 89, folio 150.)

The questions are: Was Mr. Jardine an agent upon whom service might be had under this condition of affairs? Was he not appointed for the very purpose of enabling the citizens and residents of Colorado, who became the creditors of the plaintiff, to sue it and secure the payment of their debts? Did the transit of Jardine, across the imaginary line separating San Miguel and Ouray counties, divest him of authority, take away the opportunity sought to be secured by the statute to the citizens of Colorado to enforce their claims in the jurisdiction wherein they were created, and render it impossible to obtain judgment therefor against the plaintiff; in brief, annul the statute, and render The Cosmopolitan Mining Company immune against the service of process and the collection of debts, while it yet retained its property and was in position to do just as it chose therewith?

The facts above narrated appear, directly and indirectly, clearly by the record and the portions thereof to which we have above referred. We contend that this court has, by unmistakable decisions, held that,

under circumstances above set forth, the court had jurisdiction by virtue of the service upon Jardine, and the judgments were therefore valid, and the very object of the statute requiring the designation of an authorized agent necessarily authorized these proceedings. We call attention only to the recent decisions, which are so direct, conclusive and thoroughly just that they need no reinforcement or multiplication of decisions from other jurisdictions.

Mutual Reserve Fund Life Association vs. Phelps, 190 U. S., 147.

In addition to holding that the cancellation of the right of the company to do business in Kentucky did not take away the right of those with whom it had done business to serve process upon the insurance commissioner, the court discusses and decides the purpose of the designation of an authorized agent, the duration of his office, and the rights of creditor citizens of the state in which the corporation has become domiciled to obtain service upon such authorized agent in the enforcement of their claims, Mr. Justice Brewer saying:

> "Many questions were elaborately discussed by counsel, both orally and in brief, but we are of the opinion that the decisions of two or three will dispose of the case. First, the service of summons on the insurance commissioner was sufficient to bring the association into the state court as party defendant. It was stipulated between the parties that the outstanding policies existing between the association and citizens of Ken-

tucky were continued in force after the action of the insurance commissioner on October 10, 1899, and that on said policies the association had collected and was collecting premiums and assessments. It was therefore doing business within the state. Connecticut Mutual L. Ins. Co. vs. Spratley, 172 U. S., 602."

But especially do we call attention to the following portion of the opinion, as peculiarly applicable to and decisive of the case presented in the court below, quoting first from the decision of the Court of Appeals of Kentucky, in Home Benefit Society vs. Muehl, 22 Ky. L. Rep., 1378; 59 S. W., 520, to this effect:

> "It is sufficient to say that the agency created by the act of 1893 is, in its terms, broader than that created by the act of 1870. The words of the later statute express no limitation. Whatever limitation shall be applied to it must be by implication. And, when we consider the purpose of the act, it becomes clear that it would be frustrated by the construction contended for. There is no need of the right to serve process upon the insurance commissioner so long as the company has agents in the state, and we think the purpose of the section was to provide a means of obtaining service of process upon foreign companies which no longer had agents in the state upon whom process might be served in suits upon contracts made in this state, whatever may be held as to suits upon contracts entered into elsewhere."

Mr. Justice Brewer, following this quotation, says:

"Such decision of the highest court of Kentucky, construing one of its own statutes, if not controlling upon this court, is very persuasive, and it certainly is controlling, unless it be held to be merely an interpretation of a contract created by the statute. As an original question, and independently of any expression on the part of the Court of Appeals, we are of the opinion that such is the true construction. This and other kindred statutes enacted in various states indicate the purpose of the state that foreign corporations engaging in business within its limits shall submit controversies growing out of that business to its courts, and not compel a citizen having such a controversy to seek the state in which the corporation has its home for the purpose of enforcing his claims. Many of those statutes simply provided that the foreign corporation should name some person or persons upon whom service of process could be made. The insufficiency of such provision is evident, for the death or removal of the agent from the state leaves the corporation without any person upon whom process can be served. In order to remedy this defect some states, Kentucky among the number, have passed statutes, like the one before us, providing that the corporation shall consent that service may be made upon a permanent

official of the state, so that the death, removal or change of officer will not put the corporation beyond the reach of the process of the courts. It would obviously thwart this purpose if this association, having made, as the testimony shows it had made, a multitude of contracts with citizens of Kentucky, should be enabled, by simply withdrawing the authority it had given to the insurance commissioner, to compel all these parties to seek the courts of New York for the enforcement of their claims. It is true in this case the association did not voluntarily withdraw from the state, but was in effect by the state prevented from engaging in any new business. Why this was done is not shown. It must be presumed to have been for some good and sufficient reason, and it would be a harsh construction of the statute that, because the state had been constrained to compel the association to desist from engaging in any further business, it also deprived its citizens, who had dealt with the association, of the right to obtain relief in its courts. We conclude, therefore, that the service of summons on the insurance commissioner was sufficient to bring the association into the state court, and, there being nothing else to impeach the judgment, it must be considered as valid."

In short, that the object of the requirement in the statutes of the states, that some one should be designated as an authorized agent upon whom service of process should be made, was intended to se-

cure to the citizens of the state to whom the company had become indebted, the right to proceed in that jurisdiction to enforce their claims, even if the company rightfully or wrongfully ceased to do business, or was compelled to desist therefrom while it was yet indebted to citizens of the state. This right is as important and necessary to each individual creditor, or to a single creditor, as to a great number. The right is as well secured, though more precarious in its nature, when the person to be served is an authorized agent, as when he is a permanent official. If the right of the citizen can not be taken away by the act of the state in compelling the company to desist from doing business, it can not be taken away by the voluntary moving of a designated agent from one county to another. In the consideration and determination of this question, it is seen at a glance that no claim concerning the infringement of the Fourteenth Amendment by the state statute is made; that the federal Constitution has not even been glanced at in its determination; that general and far-reaching principles of law, long settled and well established, are applied to a new condition, and that, therefore, in fact, the question of the state having violated prohibitions and restrictions of the Fourteenth Amendment has never arisen.

The cases of Loeb vs. Columbia Township, 179 U. S., 472, and Holder vs. Altman, 169 U. S., 81, are relied on as sustaining the jurisdiction of this court. In those cases the constitutionality of a statute as affecting the rights of the defendant was challenged *bona fide*, and in each instance the challenge was by the trial court sustained. The defeated litigant sued

out a writ of error from this court under section 5 of the act of 1891 to the trial court, and the jurisdiction of the court was sustained. But here we contend that there is no such condition. The claim of plaintiff that the Fourteenth Amendment is applicable to the controversy is not justified by a solitary fact in the record. As well might it claim the application or construction of the Fifteenth Amendment.

> "A definite issue in respect to the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally, but necessarily and directly, that our jurisdiction can be invoked for that reason."
>
> Cornell vs. Green, 163 U. S., 80.

> "The words of the statute which empower this court to review directly the action of the Circuit Court are that such power shall exist whenever it is claimed on the record that a law of a state is in contravention of the federal Constitution. Of course, the claim must be real and colorable, not fictitious and fraudulent."
>
> Penn Co. vs. Austin, 168 U. S., 695.

"Due process of law" was essential to the validity of a personal judgment long before the Fourteenth Amendment was enacted. It was a part of that law

of the land guaranteed by Magna Charta, which neither legislature nor courts might disregard. If the judgments assailed are void, it is not because of the operation of the Fourteenth Amendment, but because the plaintiff in error was denied the benefit of the rights vouchsafed by the law of the land. Mr. Webster defined this phrase in the Dartmouth College case, and it was "intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

Bank of Columbia vs. Okeley, 4 Wheat., 235.

The requirement imposed by due process of law may be found in the Constitution of every state in the Union. Mr. Justice Field well said, in Pennoyer vs. Neff, that in all the cases brought in the state and federal courts, when attempts were made to give effect to personal judgments without service of process, they were held to be without binding force. At the same time he fully recognized the right of a state to authorize proceedings to determine the status of one of its citizens toward non-residents, and to require non-residents doing business in and making contracts within its borders to appoint representatives to receive service of process therein. If questions like those presented in the case at bar involve the construction or application of the Fourteenth Amendment, it is difficult to imagine any limitation to the power of litigants to invoke the jurisdiction of the Circuit Courts of the United States, or to review their judgments in this court. The act of 1891 will prove unavailing to re-

lieve this tribunal of its burdens, and the dockets of the Circuit Court of Appeals will become too slender to require great attention.

Respectfully submitted,

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